No. 14-1468

Title:	Danny Birchfield, Petitioner v. North Dakota
Docketed:	June 16, 2015
Linked with 14A1122	
Lower Ct:	Supreme Court of North Dakota
Case Nos.:	(20140109)
Decision Date:	January 15, 2015
Rehearing Denied:	February 12, 2015

Questions Presented

---Date----	-------Proceedings and Orders----------
May 1 2015	Application (14A1122) to extend the time to file a petition for a writ of certiorari from May 13, 2015 to July 10, 2015, submitted to Justice Alito.
May 5 2015	Application (14A1122) granted by Justice Alito extending the time to file until June 12, 2015.
Jun 12 2015	Petition for a writ of certiorari filed. (Response due July 16, 2015)
Jul 15 2015	Waiver of right of respondent North Dakota to respond filed.
Jul 29 2015	DISTRIBUTED for Conference of September 28, 2015.
Aug 10 2015	Response Requested. (Due September 9, 2015)
Sep 16 2015	Order extending time to file response to petition to and including September 24, 2015.
Sep 24 2015	Brief of respondent North Dakota in opposition filed.
Oct 14 2015	Reply of petitioner Danny Birchfield filed.
Nov 17 2015	DISTRIBUTED for Conference of December 4, 2015.
Dec 7 2015	DISTRIBUTED for Conference of December 11, 2015.
Dec 11 2015	Petition GRANTED The petitions for writs of certiorari in No. 14-1470 and No. 14-1507 are granted. The cases are consolidated and a total of one hour is allotted for oral argument.
Jan 26 2016	The time to file the joint appendix and petitioners' briefs on the merits is extended to and including February 4, 2016. VIDED
Jan 26 2016	The time to file respondents' briefs on the merits is extended to and including March 15, 2016. VIDED
Feb 4 2016	Brief of petitioner Danny Birchfield filed.
Feb 4 2016	Motion to dispense with printing the joint appendix filed by petitioner Danny Birchfield. VIDED.
Feb 8 2016	Motion for leave to file amicus brief filed by Indiana Tech Law School Amicus Project in support of neither party. VIDED.
Feb 9 2016	Brief amicus curiae of DUI Defense Lawyers Association filed. VIDED.
Feb 11 2016	Brief amici curiae of Downsize DC Foundation, et al. filed. VIDED.

Feb 11 2016	Brief amicus curiae of American Civil Liberties Union filed. VIDED.
Feb 11 2016	Brief amici curiae of The National College for DUI Defense, and The National Association of Criminal Defense Lawyers filed. VIDED.
Feb 29 2016	Motion to dispense with printing the joint appendix filed by petitioner GRANTED. VIDED
Feb 29 2016	Motion for leave to file amicus brief filed by Indiana Tech Law School Amicus Project in support of neither party GRANTED. VIDED
Mar 4 2016	SET FOR ARGUMENT ON Wednesday, April 20, 2016. VIDED
Mar 14 2016	Record requested from the Supreme Court of North Dakota.
Mar 15 2016	CIRCULATED.
Mar 15 2016	Brief of respondent North Dakota filed. (Distributed)
Mar 16 2016	Brief amicus curiae of The California District Attorneys Association filed. VIDED. (Distributed)
Mar 22 2016	Brief amicus curiae of United States filed. VIDED. (Distributed)
Mar 22 2016	Brief amici curiae of New Jersey and Seventeen Other States filed. VIDED. (Distributed)
Mar 22 2016	Brief amici curiae of The Council of State Governments, et al. filed. VIDED. (Distributed)
Mar 22 2016	Motion of the Solicitor General for enlargement of time for oral argument, for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Mar 22 2016	Brief amicus curiae of Mothers Against Drunk Driving filed. VIDED. (Distributed)
Mar 22 2016	Brief amici curiae of The National District Attorneys Association, et al. filed. VIDED. (Distributed)
Apr 4 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for enlargement of time for oral argument, and for divided argument GRANTED. and the time is divided as follows: 35 minutes for petitioners, 15 minutes for respondent North Dakota, 10 minutes for respondent Minnesota, and 10 minutes for the Solicitor General. VIDED
Apr 13 2016	Reply of petitioner Danny Birchfield filed. (Distributed.)
Apr 20 2016	Argued. For petitioners: Charles A. Rothfeld, Washington, D. C. For respondents in Nos. 14-1468 & 14-1507: Thomas R. McCarthy, Arlington, Va. For respondent in 14-1470: Kathryn Keena, Assistant Dakota County Attorney, Hastings, Minn. For United States as amicus curiae in support of respondents: Ian H. Gershengorn, Deputy Solicitor General, Department of Justice, Washington, D. C. VIDED.
Jun 23 2016	Judgment in No. 14-1468 REVERSED and case REMANDED. Judgment in No. 14-1470 AFFIRMED. Judgment in No. 14-1507 VACATED AND REMANDED. Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Breyer, and Kagan, JJ., joined. Sotomayor, J., filed an opinion concurring in part and dissenting in part, in which Ginsburg, J., joined. Thomas, J., filed an opinion concurring in the judgment in part and dissenting in part.
Jul 25 2016	JUDGMENT ISSUED
Jul 25 2016	MANDATE ISSUED

14-1468

Supreme Court, U.S.
FILED
JUN 12 2015
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Dakota

PETITION FOR A WRIT OF CERTIORARI

DAN HERBEL
Herbel Law Firm
The Regency Business Center
3333 East Broadway Ave., Suite 1205
Bismarck, ND 58501
(701) 323-0123

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

QUESTION PRESENTED

North Dakota law makes it a criminal offense for a motorist who has been arrested for driving under the influence to refuse to submit to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol. The Supreme Court of North Dakota held that the State may criminalize *any* refusal by a motorist to submit to such a test, even if a warrant has not been obtained. The question presented is:

Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement	3
Reasons for Granting the Petition	7
Conclusion	13
Appendix A – North Dakota Supreme Court opinion (January 15, 2015)	1a
Appendix B – Criminal judgment (March 20, 2014)	19a
Appendix C – District court decision (January 16, 2014)	22a
Appendix D – Order denying rehearing (February 12, 2015)	29a

TABLE OF AUTHORITIES

Page(s)

CASES

Amelkin v. *McClure*,
330 F.3d 822 (6th Cir. 2003) 9

Arizona v. *Gant*,
556 U.S. 332 (2009) 10

Beylund v. *Levi*,
859 N.W.2d 403 (N.D. 2015) 7

Byars v. *State*,
336 P.3d 939 (Nev. 2014) 11

Camara v. *Mun. Court of City & Cnty. of San Francisco*,
387 U.S. 523 (1967) 6, 9

Flonnory v. *State*,
2015 WL 374879 (Del. 2015) (unpublished) 11

Koontz v. *St. Johns River Water Mgmt. Dist.*,
133 S. Ct. 2586 (2013) 9

Maryland v. *King*,
133 S. Ct. 1958 (2013) 10

Missouri v. *McNeely*,
133 S. Ct. 1552 (2013) ..... *passim*

Reeder v. *State*,
428 S.W.3d 924 (Tex. App. 2014) 11

Riley v. *California*,
134 S. Ct. 2473 (2014) 10

Skinner v. *Ry. Labor Execs'. Ass'n*,
489 U.S. 602 (1989) 8

TABLE OF AUTHORITIES—continued

Page(s)

State v. *Arrotta*,
339 P.3d 1177 (Idaho 2014) 11

State v. *Baxter*,
2015 WL 1914409 (N.D. 2015) 7

State v. *Bernard*,
844 N.W.2d 41 (Minn. Ct. App. 2014) 5

State v. *Bernard*,
859 N.W.2d 762 (Minn. 2015) 5, 12

State v. *Beylund*,
861 N.W.2d 172 (N.D. 2015) 7

State v. *Butler*,
302 P.3d 609 (Ariz. 2013) 11

State v. *Declerck*,
317 P.3d 794 (Kan. Ct. App. 2014) 11

State v. *Fierro*,
853 N.W.2d 235 (S.D. 2014) 11

State v. *Halseth*,
339 P.3d 368 (Idaho 2014) 11

State v. *Wulff*,
337 P.3d 575 (Idaho 2014) 11

State v. *Yong Shik Won*,
332 P.3d 661 (Haw. Ct. App. 2014) 11

United States v. *Brown*,
2013 WL 5604589 (D. Md. 2013) 11

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES

N.D. Code § 39-06.2-10.2 ..... 2, 3

N.D. Code § 39-08-01(1) 2, 4

N.D. Code § 39-20-01 ..... 2, 3

N.D. Code § 39-20-14 ..... 2, 3

MISCELLANEOUS

Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989) 9

PETITION FOR A WRIT OF CERTIORARI

Petitioner Danny Birchfield respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of North Dakota in this case.

OPINIONS BELOW

The opinion of the Supreme Court of North Dakota (App., *infra*, 1a-18a) is reported at 858 N.W.2d 302. The decision of the North Dakota District Court (App., *infra*, 22a-28a) is unreported.

JURISDICTION

The judgment of the Supreme Court of North Dakota was entered on January 15, 2015. That court denied petitioner's motion for rehearing on February 12, 2015. *Id.* at 29a. On May 5, 2015, Justice Alito extended petitioner's time to file a petition for certiorari until June 12, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

North Dakota law, N.D. Code § 39-08-01(1), provides in relevant part:

> 1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:
>
> * * *
>
> e. That individual refuses to submit to any of the following:
>
> (1) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-06.2-10.2 if the individual is driving or is in actual physical control of a commercial motor vehicle; or
>
> (2) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-20-01; or
>
> (3) An onsite screening test, or tests, of the individual's breath for the purpose of estimating the alcohol concentration in the individual's breath upon the request of a law enforcement officer under section 39-20-14.

> 2. a. An individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state who refuses to submit to a chemical test, or tests, required under section 39-06.2-10.2, 39-20-01, or 39-20-14, is guilty of an offense under this section.

STATEMENT

This petition is one of several now before the Court presenting a question of exceptional importance: whether a State may criminalize a motorist's refusal to consent to chemical tests of his or her blood, breath, or urine. In affirming convictions for violation of these statutes, state courts have invoked a variety of justifications, among them that such tests may be treated as a routine search incident to arrest; that motorists may be *deemed* to have consented to the administration of such tests; and that such warrantless test requirements are *per se* reasonable. These holdings depart from decisions of this Court, conflict with the rulings of other federal and state courts, and contribute to widespread confusion about the rules governing this significant area of the law.

The issue presented here accordingly warrants this Court's attention. As described more fully in the petition for certiorari in *Bernard* v. *Minnesota*, No. 14-___ (to be filed on June 15, 2015), the Court should grant review both in that case and in this one, and should consolidate the cases for plenary review. Alternatively, the Court should grant review in *Bernard* and hold the petition in this case pending disposition of that matter.

1. North Dakota, like twelve other states, has criminalized a motorist's refusal to submit to a warrantless chemical test designed to detect the presence of alcohol in the driver's blood. See N.D. Code § 39-08-01(1). A first refusal to consent to a chemical test qualifies as a misdemeanor, while subsequent offenses may qualify as a felony. *Ibid.*

2. Here, after petitioner drove his car off the road, he failed a field sobriety test administered by a highway patrol officer. App., *infra*, 2a. A preliminary breath test suggested that petitioner was intoxicated, and the officer placed petitioner under arrest and advised him of the implied consent statute. *Ibid.* Petitioner nonetheless refused to submit to a blood test. *Ibid.* See also *id.* at 24a, 26a. He was charged with refusal to submit to a chemical test, but *not* for driving under the influence. *Ibid.*

Petitioner moved to dismiss the charge, asserting that it is "unconstitutional" under "the Fourth Amendment to the United States Constitution" for a State to criminalize refusal to submit to a chemical test of a driver's blood. App., *infra*, 22a. The state district court denied his motion. *Id.* at 22a-28a. The court reasoned that "[i]n an implied consent advisory scenario, a defendant has already granted implied consent to the search" and, further, that "[t]he basis for this implied consent is grounded in a strong public interest of promoting public safety." *Id.* at 24a. The court added that because petitioner "refused the test, the requested search, the blood draw, was not conducted." *Id.* at 26a. In the court's reasoning, because "[t]here was no search," "there was no Fourth Amendment violation." *Ibid.*

Following the district court's denial of his motion, petitioner conditionally pled guilty to the of-

fense but, as noted in the criminal judgment, "specifically reserve[ed] the right to appeal the January 16, 2014, Order on Motion to Dismiss." App., *infra*, 19a-21a.

3. On appeal, the Supreme Court of North Dakota affirmed. App., *infra*, 1a-18a.

Although the court acknowledged that "the administration of chemical tests to determine alcohol concentration is a search" for purposes of the Fourth Amendment, it concluded that the State may prosecute an individual for failing to consent to such a warrantless search. *Id.* at 5a. The court appears to have rested this conclusion on two rationales.

First, the court opined that attaching criminal penalties to test refusal in this context is, as a general matter, reasonable. The court relied for this proposition on the Minnesota intermediate appellate decision in *State* v. *Bernard*, 844 N.W.2d 41, 42 (Minn. Ct. App. 2014), which reasoned that the "'Fourth Amendment does not prohibit the state from criminalizing a suspected drunk driver's refusal to submit to a breath test for alcohol content when the circumstances established a basis for the officer to have alternatively pursued a constitutionally reasonable nonconsensual test by securing and executing a warrant.'" App., *infra*, 9a (quoting *Bernard*, 844 N.W.2d at 42).[1] Here, the North Dakota court explained that its State's implied consent law does "not

---

[1] Subsequently, the Supreme Court of Minnesota expressly rejected the reasoning of the Minnesota appellate court relied upon below (see *State* v. *Bernard*, 859 N.W.2d 762, 766 (Minn. 2015)), although it affirmed a State's authority to criminalize test refusal on the alterative ground that a blood alcohol test is a search incident to arrest.

authorize chemical testing unless an officer has probable cause to believe the defendant is under the influence, and the defendant will already have been arrested on the charge." *Id.* at 13a. Thus, the court appears to have taken the view it is reasonable to compel an individual to consent to a chemical test when an officer has probable cause to administer a breath or blood test, even when the officer does not in fact obtain a warrant to do so. The court concluded: "Criminally penalizing test refusal reduces the likelihood that drunk drivers will avoid a criminal penalty by refusing to take a test and, therefore, it is reasonable because it is an efficient tool in discouraging drunk driving." *Id.* at 16a (quotations omitted).

Second, the court reasoned that the entitlement to drive may be conditioned on the driver's deemed agreement to consent to a chemical test and that the "unconstitutional conditions doctrine" is not implicated where, as here, the State merely "criminalizes the refusal to submit to a chemical test but does not authorize a warrantless search." App., *infra*, 13a. See App., *infra*, 12a-13a (distinguishing *Camara* v. *Mun. Court of City & Cnty. of San Francisco*, 387 U.S. 523, 540 (1967)). The court added that "the giving of the implied consent advisory informing the arrestee that refusing a chemical test is a crime does not render consent to the test involuntary." App, *infra*, 16a-17a. The state Supreme Court—like the district court—thus appears to have taken the view that criminalizing refusal to consent to a warrantless search does not run afoul of the unconstitutional conditions doc-

trine so long as the unconstitutional search does not in fact occur.[2]

The state court subsequently denied petitioner's request for rehearing. App., *infra*, 29a.

REASONS FOR GRANTING THE PETITION

This petition is one of several that do or will present the question whether a State may criminalize a motorist's refusal to consent to a warrantless chemical search. Petitions raising this question are being filed contemporaneously herewith, see *Bernard* v. *Minnesota*, No. 14-___, and *Washburn* v. *North Dakota*, 14-___. Additional petitions will soon follow. See *State* v. *Beylund*, 861 N.W.2d 172 (N.D. 2015); *State* v. *Baxter*, No. 20140325, 2015 WL 1914409 (N.D. 2015).

For reasons described at greatest length in the *Bernard* petition, petitioner respectfully suggests that the Court grant certiorari in both that matter and this one, and consolidate the cases for argument. Granting both cases would present the Court with the broadest range of rationales that have been asserted in defense of convictions like the one in this case, as well as the broadest range of factual settings in which test-refusal statutes have been applied. Al-

---

[2] More recently, addressing a civil penalty but pointing to its decision in this case, the North Dakota Supreme Court restated in more detail its holding that persons are deemed to have "voluntarily consented to the chemical blood test" under the State's test-refusal statute, and that this conclusion is consistent with the unconstitutional conditions doctrine. *Beylund* v. *Levi*, 859 N.W.2d 403, 414 (N.D. 2015); see *id.* at 410-414. A petition for review in this case will soon be filed.

ternatively, the Court should hold this petition pending its disposition of *Bernard*.

This Court's review of the question presented is plainly warranted: the decision below is wrong; that decision conflicts with the holdings of other state and federal courts; and the question is one of tremendous practical and doctrinal importance.

1. The decision below cannot be squared with this Court's Fourth Amendment jurisprudence. In *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013), the Court concluded that the natural metabolization of alcohol in the bloodstream does not present a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in drunk-driving cases. Instead, whether the circumstances justify an exception to the warrant requirement must turn on a case-by-case assessment that considers the totality of the circumstances. This holding is based upon the general principle that public officials may employ sweeping warrantless searches only in extraordinary circumstances. See *Skinner* v. *Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619 (1989). Yet a routine DUI investigation, like the one in this case, is among the most ordinary of law enforcement functions and must be analyzed according to traditional Fourth Amendment principles, which preclude an "overly broad categorical approach * * * in a context where significant privacy interests are at stake." *McNeely*, 133 S. Ct. at 1564.

In light of this principle, a State's blanket policy of criminalizing *all* refusals by a motorist to submit to a warrantless chemical test in cases where the driver has been arrested for driving under the influence cannot withstand constitutional scrutiny; the

lower court's reasoning to the contrary in this case is incorrect.

To begin with, the court was wrong in holding that "deemed consent" can substitute for actual consent in this context. It is settled that, where an individual has "a constitutional right" not to be searched absent a "warrant to search," a State may not criminalize "refusing to consent" to the search. *Camara* v. *Mun. Court of City & Cnty. of San Francisco*, 387 U.S. 523, 540 (1967). Likewise, the "unconstitutional conditions doctrine * * * vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). Thus, the "'government may not grant a benefit on the condition that the beneficiary surrender a constitutional right.'" *Amelkin* v. *McClure*, 330 F.3d 822, 827-828 (6th Cir. 2003) (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989)).

These doctrines apply fully in this setting, and establish that a State may not condition award of a driver's license on the driver's consent to submit to a warrantless search. North Dakota has criminalized all "refus[als] to consent" (*Camara*, 387 U.S. at 540) to warrantless chemical searches of motorists notwithstanding that—as *McNeely* and the Court's broader Fourth Amendment holdings make clear—the government is not authorized to conduct such warrantless searches in all cases. Thus, under *Camara*, the State may not prosecute a driver's refusal to consent to a search. Nor may the State suggest that such consent is implied as a condition on the motorist's privilege of obtaining a driver's li-

cense, as this would violate the unconstitutional conditions doctrine.

The lower court's other rationale—that the search is "reasonable" in a general sense—is wholly inconsistent with the fundamental understanding that "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment" unless they fall within one of "a few specifically established and well-delineated exceptions." *Arizona* v. *Gant*, 556 U.S. 332, 338 (2009). That principle belies the reasoning below that Fourth Amendment requirements may be set aside simply because criminalizing test refusal "'is an efficient tool in discouraging drunk driving.'" App., *infra*, 16a (citation omitted). And the North Dakota court's observation that these prosecutions often involve circumstances where the police officer *could have* obtained a warrant (*id.* at 13a, 14a) misses the mark. The constitutional protections of the Fourth Amendment are not set aside whenever officers believe that they have probable cause to search and *could have* but *did not* obtain a warrant. The act of obtaining the warrant is one of grave constitutional significance that "is 'an important working part of our machinery of government'" (*Riley* v. *California*, 134 S. Ct. 2473, 2493 (2014), and the need for a warrant is greatest when—as here—the search involves "discretion that could properly be limited by the 'interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer.'" *Maryland* v. *King*, 133 S. Ct. 1958, 1969 (2013) (citation omitted; bracketed material added by the Court). Indeed, the holding below—that a warrant is unnecessary whenever drunk driving is suspected—would essentially read *McNeely* off the books.

2. The reasoning of the Supreme Court of North Dakota also conflicts with that of other courts. After *McNeely*, many courts have clarified that the fiction of implied consent does not constitute a *per se* justification for a warrantless chemical test: "an implied consent statute * * * does not justify a warrantless blood draw from a driver who refuses to consent[] * * * or objects to the blood draw * * *. Consent to a search must be voluntary. * * * Inherent in the requirement that consent be voluntary is the right of the person to withdraw that consent." *State* v. *Halseth*, 339 P.3d 368, 371 (Idaho 2014).

Halseth is not alone. *See State* v. *Butler*, 302 P.3d 609, 613 (Ariz. 2013); *Flonnory* v. *State*, 2015 WL 374879, at *4 (Del. 2015) (unpublished); *Byars* v. *State*, 336 P.3d 939, 945-946 (Nev. 2014) (striking down a provision of the State's implied consent law on the ground that the statute could not by itself authorize a warrantless blood draw); *State* v. *Arrotta*, 339 P.3d 1177, 1178 (Idaho 2014); *State* v. *Wulff*, 337 P.3d 575, 582 (Idaho 2014); *State* v. *Fierro*, 853 N.W.2d 235, 241 (S.D. 2014); *Reeder* v. *State*, 428 S.W.3d 924, 930 (Tex. App. 2014); *State* v. *Declerck*, 317 P.3d 794, 804 (Kan. Ct. App. 2014); *United States* v. *Brown*, 2013 WL 5604589, at *4 & n.1 (D. Md. 2013). But see *State* v. *Yong Shik Won*, 332 P.3d 661, 681 n. 23 (Haw. Ct. App. 2014) ("In effect, by exercising the privilege of driving, a driver (like Won) consents to submit to a breath test."). This conflict in the lower courts, which stems from a disagreement about the meaning of this Court's holdings, can be resolved only by this Court.

3. Finally, there can be no disputing that the question posed in this case is one of the utmost practical importance. As detailed in the *Bernard* petition

(at 30-33), at least thirteen States criminalize a motorist's refusal to consent to a chemical test. Those States' test-refusal statutes are applied with considerable frequency: tens, if not hundreds, of thousands of convictions each year turn on the question presented here. Other States, moreover, are considering legislation that would impose similar criminal penalties, or are otherwise considering the adoption of other "rules, procedures, and protocols that meet the reasonableness requirements of the Fourth Amendment" in response to this Court's decision in *McNeely*. 133 S. Ct. at 1569 (Kennedy, J., concurring in part). This Court's guidance on the question presented is thus necessary, both to settle the constitutionality of these myriad convictions and to provide the States with necessary prospective guidance on what tools may appropriately be used to address driving under the influence.

4. If the Court concludes that review of the issue presented here is warranted, we suggest that it grant certiorari both in *Bernard* and in this case. That would present the Court with both the broadest array of rationales advanced in defense of the constitutionality of test-refusal statutes and the widest array of factual settings in which those statutes are applied (*Bernard* involved a breath test, see 859 N.W.2d at 767 & n.4, whereas this case a blood test, see App., *infra*, 24a, 26a). Alternatively, we urge the Court to grant review in *Bernard* and to hold the petition in this case pending the resolution of that matter.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the petition in this case should be held pending the disposition of *Bernard* v. *Minnesota*, No. 14-___.

Respectfully submitted.

DAN HERBEL
Herbel Law Firm
The Regency Business Center
3333 East Broadway Ave., Suite 1205
Bismarck, ND 58501
(701) 323-0123

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic[3]
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3147
crothfeld@mayerbrown.com

Counsel for Petitioner

JUNE 2015

---

[3] The representation of petitioner by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

APPENDICES

APPENDIX A

Filed 1/15/15 by Clerk of Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2015 ND 6

State of North Dakota,
Plaintiff and Appellee

v.

Danny Birchfield,
Defendant and Appellant

No. 20140109

Appeal from the District Court of Morton County, South Central Judicial District, the Honorable Bruce B. Haskell, Judge.

AFFIRMED.

Opinion of the Court by McEvers, Justice.

Justin M. Balzer, Morton County Assistant State's Attorney, 210 2nd Avenue Northwest, Mandan, N.D. 58554, for plaintiff and appellee.

Danny L. Herbel, The Regency Business Center, 3333 East Broadway Avenue, Suite 1205, Bismarck, N.D. 58501, for defendant and appellant.

Ken R. Sorenson, Office of Attorney General, 600 East Boulevard Avenue, Department 125, Bismarck, N.D. 58505-0040, for amicus curiae.

State v. Birchfield
No. 20140109

McEvers, Justice.

Danny Birchfield appeals from a criminal judgment entered on a conditional plea of guilty to class B misdemeanor refusal to submit to a chemical test in violation of N.D.C.C. § 39-08-01, reserving his right to appeal the district court's denial of his motion to dismiss the charge on constitutional grounds. Because we conclude the criminal refusal statute does not violate Birchfield's rights under the Fourth Amendment or N.D. Const. art. I, § 8, we affirm the criminal judgment.

I

On October 10, 2013, Birchfield drove into a ditch in Morton County. A highway patrol officer arrived at the scene, believed Birchfield was intoxicated, and asked Birchfield to perform field sobriety tests, which he failed. Birchfield took a preliminary breath test, which revealed a .254 percent alcohol concentration. The officer placed Birchfield under arrest and read him the implied consent advisory. Birchfield refused to consent to a chemical test.

Birchfield was charged with refusal to submit to a chemical test in violation of N.D.C.C. § 39-08-01, a class B misdemeanor. Birchfield moved to dismiss the criminal charge, contending N.D.C.C. § 39-08-01, which criminalizes a refusal to submit to a chemical test, is unconstitutional under the Fourth Amendment and its state counterpart, N.D. Const. art. I, § 8. The district court concluded Birchfield's rights under these provisions were not violated by the criminal charge for refusing to consent to a chemical test. Birchfield conditionally pled guilty under

N.D.R.Crim.P. 11(a)(2), reserving his right to appeal the court's order denying his motion to dismiss.

II

Birchfield argues the district court erred in denying his motion to dismiss because the criminal refusal statute is unconstitutional under the Fourth Amendment and N.D. Const. art. I, § 8, and as applied to him.

Our standard for reviewing constitutional challenges to legislative enactments is well-established:

> The determination whether a statute is unconstitutional is a question of law, which is fully reviewable on appeal. All regularly enacted statutes carry a strong presumption of constitutionality, which is conclusive unless the party challenging the statute clearly demonstrates that it contravenes the state or federal constitution. Any doubt about a statute's constitutionality must, when possible, be resolved in favor of its validity. The power to declare a legislative act unconstitutional is one of the highest functions of the courts, and that power must be exercised with great restraint. The presumption of constitutionality is so strong that a statute will not be declared unconstitutional unless its invalidity is, in the court's judgment, beyond a reasonable doubt. The party challenging the constitutionality of a statute has the burden of proving its constitutional infirmity.

Simons v. State, 2011 ND 190, ¶ 23, 803 N.W.2d 587 (internal citations omitted).

Driving is a privilege, not a constitutional right and is subject to reasonable control by the State un-

der its police power. *See, e.g., State v. Smith*, 2014 ND 152, ¶ 8, 849 N.W.2d 599; *McCoy v. North Dakota Dep't of Transp.*, 2014 ND 119, ¶ 26, 848 N.W.2d 659. Under N.D.C.C. § 39-20-01(1), an individual who drives "is deemed to have given consent, and shall consent, subject to the provisions of this chapter, to a chemical test . . . ." A chemical test may be administered "only after placing the individual . . . under arrest." N.D.C.C. § 39-20-01(2). However, a driver has a right to refuse a chemical test under N.D.C.C. § 39-20-04(1), which provides, "If a person refuses to submit to testing under section 39-20-01 . . . , none may be given." *See State v. Fetch*, 2014 ND 195, ¶ 8.

The criminal refusal provision is contained in N.D.C.C. § 39-08-01, which provides in relevant part:

> 1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:
>
> . . . .
>
> e. That individual refuses to submit to any of the following:
>
> . . . .
>
> (2) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direc-

> tion of a law enforcement officer under section 39-20-01; . . .
>
> . . . .
>
> 2. An individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state who refuses to submit to a chemical test, or tests, required under section . . . 39-20-01 . . . is guilty of an offense under this section.

Section 39-20-01, N.D.C.C., sets forth the implied consent requirements for motor vehicle drivers in general and in subsection 3 states that the "law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs" and "that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence."

The Fourth Amendment and N.D. Const. art. I, § 8, prohibit unreasonable searches and seizures, and the administration of chemical tests to determine alcohol concentration is a search for purposes of these constitutional provisions. *See Smith*, 2014 ND 152, ¶ 7, 849 N.W.2d 599; *McCoy*, 2014 ND 119, ¶ 10, 848 N.W.2d 659. Before the Legislature enacted the criminal refusal statute in 2013, this Court had observed "[t]here is no Federal constitutional right to be entirely free of intoxication tests," *State v. Murphy*, 516 N.W.2d 285, 286 n.1 (N.D. 1994), and noted a "driver has only a conditional right to refuse a chemical test" because "[a]mong the conditions imposed upon the exercise of one's right to refuse a chemical test are

the revocation of the person's license or permit to drive a vehicle and the admission in evidence of proof of refusal in civil or criminal actions." *State v. Murphy*, 527 N.W.2d 254, 256 (N.D. 1995). We had not specifically ruled on a Fourth Amendment challenge to the penalty provisions of the implied consent statutes as they existed at the time.

However, other states during this period had enacted statutes criminalizing the refusal to consent to a chemical test, and Fourth Amendment challenges to those statutes were unsuccessful. For example, in *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1451 (9th Cir. 1986), the Ninth Circuit Court of Appeals upheld Alaska's criminal refusal statute against a Fourth Amendment challenge:

> Appellants' basic argument is that they have been deprived of their right to be free of unreasonable searches. Nothing in the Alaska statutes here at issue deprives them of that right, or otherwise burdens it. A motorist who has been stopped for DWI and who wishes to vindicate himself has two choices under the law. He may take the test as the state prefers him to do. If he does, and the evidence obtained is favorable to him, he will gain his prompt release with no charge being made for drunk driving. *See Mackey v. Montrym*, 443 U.S. [1, 19 (1979)]. If the evidence is unfavorable, he may challenge the government's use of that evidence by attacking the validity of the arrest. If he does not take the test, he can still challenge the evidence of his refusal by once again attacking the validity of the arrest. Either way, he remains fully capable of asserting the only

> Fourth Amendment right he possesses: the right to avoid arrest on less than probable cause. Thus, no improper condition has been placed on the exercise of appellants' rights under the Fourth Amendment.

See also *State v. Netland*, 762 N.W.2d 202, 214 (Minn. 2009) ("We hold that the criminal test-refusal statute does not violate the prohibition against unreasonable searches and seizures found in the federal and state constitutions because under the exigency exception, no warrant is necessary to secure a blood-alcohol test where there is probable cause to suspect a crime in which chemical impairment is an element of the offense.") (footnote omitted); *Rowley v. Commonwealth*, 629 S.E.2d 188, 191 (Va. Ct. App. 2006) (no Fourth Amendment violation for criminally punishing refusal to provide breath sample because the "act of driving constitutes an irrevocable, albeit implied, consent to the officer's demand for a breath sample"). The courts in these cases relied in part on the United States Supreme Court's decision in *Schmerber v. California*, 384 U.S. 757, 770 (1966) (internal citation omitted), which upheld the warrantless blood test of a person arrested for driving under the influence because the arresting officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'"

In 2013, the United States Supreme Court decided *Missouri v. McNeely*, 133 S. Ct. 1552, 1568 (2013) (plurality decision), which held that "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a

blood test without a warrant." The Court rejected the notion that *Schmerber* established that natural dissipation of alcohol in the bloodstream is a per se exigency that suffices to justify an exception to the warrant requirement, and interpreted *Schmerber* to require a "totality of the circumstances approach." *Id.* at 1559. The Court rejected the argument that a per se exigency rule was necessary to protect the governmental interest in preventing and prosecuting drunk-driving offenses noting:

> States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. . . . Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution. . . . see also South Dakota v. Neville, 459 U.S. 553, 554, 563-564, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) (holding that the use of such an adverse inference does not violate the Fifth Amendment right against self-incrimination).

Id. at 1566.

Since the *McNeely* decision, we have held that consent to a chemical test is not coerced and is not

rendered involuntary merely by a law enforcement officer's reading of the implied consent advisory that accurately informs the arrestee of the consequences for refusal, including the administrative and criminal penalties, and presents the arrestee with a choice. *See McCoy*, 2014 ND 119, ¶ 21, 848 N.W.2d 659; *Smith*, 2014 ND 152, ¶ 16, 849 N.W.2d 599; *State v. Boehm*, 2014 ND 154, ¶ 20, 849 N.W.2d 239; *Fetch*, 2014 ND 195, ¶ 9. The United States Supreme Court has not decided, and it is a question of first impression in North Dakota, whether criminalizing a refusal to consent to a chemical test violates a person's right to be free from unreasonable searches and seizures.

Birchfield has not drawn our attention to any appellate court decisions striking down criminal refusal statutes, and we have found that since the Supreme Court's ruling in *McNeely*, criminal refusal statutes have continued to withstand Fourth Amendment challenges, particularly in Minnesota. The Minnesota Court of Appeals has held that the "Fourth Amendment does not prohibit the state from criminalizing a suspected drunk driver's refusal to submit to a breath test for alcohol content when the circumstances established a basis for the officer to have alternatively pursued a constitutionally reasonable nonconsensual test by securing and executing a warrant." *State v. Bernard*, 844 N.W.2d 41, 42 Syll., 47 (Minn. Ct. App. 2014) (but declining to decide whether "the implied consent law is unconstitutional because it conditions the exercise of the privilege of driving on the driver surrendering his constitutional right to be free of unreasonable searches and seizures"), *review granted* (May 20, 2014). *See also State v. Brooks*, 838 N.W.2d 563, 572 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014) (rejecting consti-

tutional argument that "the Legislature does not have the power to imply someone's consent to waive his or her Fourth Amendment rights as a condition of granting the privilege to drive in Minnesota"). In *State v. Yong Shik Won*, 332 P.3d 661, 681-82 (Hawai'i Ct. App. 2014), *cert. granted*, 2014 WL 2881259 (Hawai'i, June 24, 2014), the Hawai'i Court of Appeals held that its "statutory scheme, which imposes [criminal] sanctions to dissuade a driver from withdrawing his or her con[s]ent [to a breath test], is reasonable and does not violate the Fourth Amendment" or its state constitutional counterpart. Numerous unreported decisions, mostly from the Minnesota Court of Appeals, have also ruled criminal refusal statutes do not violate the Fourth Amendment. *See, e.g.*, *Hoover v. Ohio*, 549 Fed. Appx. 355 (6th Cir., Dec. 4, 2013); *United States v. Muir*, 2014 WL 4258701 (D. Ct. Md., Aug. 28, 2014); *State v. Isaacson*, 2014 WL 1271762 (Minn. Ct. App., March 31, 2014) *review granted* (June 17, 2014); *State v. Manska*, 2014 WL 1516316 (Minn. Ct. App., April 21, 2014), *review granted* (June 25, 2014); State v. Ornquist, 2014 WL 2565662 (Minn. Ct. App., June 9, 2014); *State v. Johnson*, 2014 WL 2565771 (Minn. Ct. App., June 9, 2014), *review granted* (August 19, 2014); *State v. Chasingbear*, 2014 WL 3802616 (Minn. Ct. App., Aug. 4, 2014) *review granted* (Oct. 14, 2014); *State v. Poitra*, 2014 WL 3892709 (Minn. Ct. App., Aug. 11, 2014) *review granted* (Oct. 14, 2014); and *State v. Trahan*, 2014 WL 4798876 (Minn. Ct. App., Sept. 29, 2014) *review granted* (Dec. 16, 2014).

In addressing *McNeely*, these courts point out as we have in our cases, that *McNeely* merely held the natural metabolization of alcohol in the bloodstream is not a per se exigency justifying a Fourth Amend-

ment exception to the warrant requirement for nonconsensual blood testing in all drunk-driving cases, and did not address the constitutional validity of implied consent statutes. *See, e.g., Yong Shik Won*, 332 P.3d at 682; *Isaacson*, 2014 WL 1271762 at *2. They also point out the *McNeely* Court referred to acceptable "legal tools" with "significant consequences" for refusing to submit to testing which are available to the states as alternatives to warrantless, nonconsensual blood draws, including the constitutional use under the Fifth Amendment of a defendant's refusal to submit to chemical testing to show the defendant is guilty of drunk driving under *South Dakota v. Neville*, 459 U.S. 553 (1983). *See, e.g.*, Yong Shik Won, at 682; *Manska*, 2014 WL 1516316 at *7; *Chasingbear*, 2014 WL 3802616 at *2. The *Chasingbear* court explained:

> While the re-emphasized *Neville* decision is not a Fourth Amendment case, *McNeely* certainly is. And it was in the Fourth Amendment context that *McNeely* expressly reminds us through *Neville* that a state can *constitutionally* use the driver's test refusal (that is, the driver's exercise of his Fourth Amendment right not to be tested without consent) as inferential evidence to convict the driver of a crime, even though the Constitution would have prohibited the state from forcing that driver to submit to an actual chemical test. This contrasts sharply with the general rule that due process bars prosecutors from referring to a defendant's refusal to consent to a warrantless search to raise an inference of guilt. . . That the Supreme Court in *McNeely* buttressed its Fourth Amendment holding on the states' lawful authority

> to rely on test refusals *to convict drivers of a crime* significantly undermines the district court's conclusion that the Minnesota test-refusal statute is infected by a fatal Fourth Amendment infirmity.

Id. (citations omitted).

The district court in this case ruled because Birchfield refused to be tested, as was his right, and was not tested, "[t]here was no search so there was no Fourth Amendment violation." This reasoning requires examination of *Camara v. Municipal Court of City & Cnty. of San Francisco*, 387 U.S. 523 (1967), relied upon by Birchfield, in which no search was conducted but the Supreme Court found a Fourth Amendment violation. In *Camara*, a property owner refused to allow a warrantless inspection of his premises, but a city ordinance authorized city employees "'upon presentation of proper credentials'" to enter any building in the city. *Id.* at 526. The owner was criminally charged with refusing to permit an inspection in violation of the city code and he argued the city code section "is contrary to the Fourth and Fourteenth Amendments in that it authorizes municipal officials to enter a private dwelling without a search warrant and without probable cause to believe that a violation of the Housing Code exists therein." *Id.* at 527. The Supreme Court ruled the owner "had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection." *Id.* at 540.

Courts have distinguished *Camara* on the grounds urged by the State in this case. Unlike the regulation in *Camara* which allowed for suspicionless searches of private property, implied

consent laws, like North Dakota law, do not authorize chemical testing unless an officer has probable cause to believe the defendant is under the influence, and the defendant will already have been arrested on the charge. *See, e.g.*, *Hoover*, 549 Fed. Appx. at 356; *Poitra*, 2014 WL 3892709 at *2 n.3. Even onsite screening tests are allowed only when an officer "has reason to believe that the individual committed a moving traffic violation or was involved in a traffic accident as a driver, and in conjunction with the violation or the accident the officer has, through the officer's observations, formulated an opinion that the individual's body contains alcohol," N.D.C.C. § 39-20-14(1), and the *Camara* Court would have authorized code enforcement searches on less than traditional probable cause. 387 U.S. at 534-39. Unlike the regulation in *Camara*, the test refusal statute criminalizes the refusal to submit to a chemical test but does not authorize a warrantless search. *See Poitra*, at *4. Furthermore, reliance on *Camara* "overlooks the apparent difference between the way the Supreme Court treats cases in which the Fourth Amendment affects searching individuals by testing in the drunk-driving context and those where it affects a home search in any context." *Chasingbear*, 2014 WL 3802616 at *14.

For similar reasons, Birchfield's reliance on *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and cases like it, is unavailing. In *Ferguson*, the Supreme Court struck down a warrantless, suspicionless regime of mandatory drug testing of maternity patients in which the test results were disclosed to police for law enforcement purposes. *Id.* at 77 n.10, 86. *See also, e.g.*, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 310, 325 (1978) (holding unconstitutional statute allowing warrantless, suspicionless searches to inspect for

safety hazards and violations of OSHA regulations); *See v. City of Seattle*, 387 U.S. 541, 546 (1967) (reversing conviction for refusing to permit fire department inspection of appellant's locked commercial warehouse without a warrant and without probable cause to believe a violation of municipal ordinances existed); *Lebron v. Secretary of Florida Dep't of Children and Families*, 772 F.3d 1352, 1378 (11th Cir. 2014) (holding "the warrantless, suspicionless urinalysis drug testing of every Florida [Temporary Assistance for Needy Families] applicant as a mandatory requirement for receiving Temporary Cash Assistance offends the Fourth Amendment"); *State v. Stewart*, 2014 ND 165, ¶ 18, 851 N.W.2d 153 (holding unconstitutional a warrantless entry into defendant's home and rejecting application of the inevitable discovery doctrine because the "doctrine does not apply when the warrant requirement is simply bypassed without exigent circumstances"). Because none of these cases were decided in the context of drunk-driving prosecutions where an officer had probable cause to search a defendant's body, we do not believe they are helpful in determining whether criminalizing a defendant's refusal to submit to a chemical test when an officer has probable cause to believe the defendant is under the influence of alcohol violates a defendant's Fourth Amendment rights. Indeed, the Supreme Court has said "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980) (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973)).

Furthermore, the "touchstone of the Fourth Amendment is reasonableness," which is assessed by balancing the promotion of legitimate governmental

interests with the intrusion on an individual's privacy. *State v. Adams*, 2010 ND 184, ¶ 15, 788 N.W.2d 619. There is no question "the State's interest in decreasing drunk driving is a valid public concern. Indeed, '[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion.'" *Martin v. North Dakota Dep't of Transp.*, 2009 ND 181, ¶ 7, 773 N.W.2d 190 (quoting *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990)). A licensed driver has a diminished expectation of privacy with respect to enforcement of drunk-driving laws because he or she is presumed to know the laws governing the operation of a motor vehicle, and the implied consent laws contain safeguards to prohibit suspicionless requests by law enforcement officers to submit to a chemical test. *See, e.g.*, *Yong Shik Won*, 332 P.3d at 681; *Stevens v. Commissioner of Pub. Safety*, 850 N.W.2d 717, 728-29 (Minn. Ct. App. 2014); Muir, 2014 WL 4258701 at *6. The Legislature created a statutory right to refuse a chemical test, but has attached significant consequences to refusal so a driver may not avoid the potential consequences of test submission and gain an advantage by simply refusing the test. *See, e.g.*, *Smith*, 2014 ND 152, ¶¶ 9-10, 849 N.W.2d 599; *McCoy*, 2014 ND 119, ¶ 12, 848 N.W.2d 659; *Murphy*, 527 N.W.2d at 255-56. The defendant here submitted to a preliminary breath test which yielded a result well above the alcohol concentration necessary to implicate the possibility that he may have been subject to enhanced penalties based on his level of intoxication. N.D.C.C. § 39-08-01(5)(a)(2) (adding additional penalties for a first offense conviction, of a higher minimum fine and at least two days' imprisonment, where the alco-

hol concentration is at least sixteen one hundredths of one percent by weight). By choosing to refuse further testing, he was subject to criminal penalty for the refusal, but was able to avoid the enhanced penalties for being highly intoxicated. Criminal refusal statutes were in existence in some states at the time *McNeely* was decided, *see*, *Smith*, at ¶ 11, a fact the Supreme Court must have been aware when it noted the "broad range of legal tools" available to states to enforce drunk-driving laws which "impose significant consequences when a motorist" refuses to consent to a chemical test. *McNeely*, 133 S. Ct. at 1566. Criminally penalizing test refusal "reduces the likelihood that drunk drivers will avoid a criminal penalty" by refusing to take a test and, therefore, it is "reasonable because it is an efficient tool in discouraging drunk driving." *Chasingbear*, 2014 WL 3802616 at **12, 13; *Johnson*, 2014 WL 2565771, at *6; *see also Yong Shik Won*, 332 P.3d at 681 n.23 ("It is reasonable for the Legislature to condition its grant of the privilege of driving on a person's agreement to submit to breath testing if arrested. . . . It is also reasonable for the Legislature to enforce that bargain by imposing [criminal] penalties on a driver who refuses to honor his or her agreement."). The criminal refusal statute satisfies the general reasonableness requirement of the Fourth Amendment.

Finally, in *Smith*, 2014 ND 152, ¶ 16, 849 N.W.2d 599, this Court relied on the Minnesota Supreme Court's decision in *Brooks*, 838 N.W.2d 563, to hold the giving of the implied consent advisory informing the arrestee that refusing a chemical test is a crime does not render consent to the test involuntary. The court in *Chasingbear*, 2014 WL 3802616, noted the anomalous situation that would arise if the

Minnesota criminal refusal statute was ruled unconstitutional.

> Chasingbear cites *Brooks*, but he does not attempt to answer the question that arises from its holding as applied to this case: If the state threatens action that is not unconstitutionally coercive in violation of a person's Fourth Amendment rights, how can the state's carrying out the threat violate the person's Fourth Amendment rights? Although *Chasingbear* does not offer an answer, the *Brooks* court, like the *McNeely* Court, suggests one: "Although refusing the test comes with criminal penalties in Minnesota, . . . [and] the choice to submit or refuse to take a chemical test 'will not be an easy or pleasant one for a suspect to make,' the criminal process 'often requires suspects and defendants to make difficult choices.'" [838 N.W.2d] at 571 (quoting *Neville*, 459 U.S. at 564, 103 S. Ct. at 923).

Chasingbear, at *3.

Unpublished decisions from other jurisdictions have value if they are persuasive. *Lucas v. Riverside Park Condominiums Unit Owners Ass'n*, 2009 ND 217, ¶ 19, 776 N.W.2d 801; *In re Guardianship of Barros*, 2005 ND 122, ¶ 15, 701 N.W.2d 402. We recognize that several of these decisions, both reported and unreported, are pending review, but we find their reasoning persuasive. We conclude the criminal refusal statute is not unconstitutional under the Fourth Amendment or N.D. Const. art. I, § 8, or as applied to Birchfield.

III

We do not address other arguments raised because they either are unnecessary to the decision or are without merit. The criminal judgment is affirmed.

Lisa Fair McEvers
Daniel J. Crothers
Dale V. Sandstrom
Carol Ronning Kapsner
Gerald W. VandeWalle, C.J.

APPENDIX B

IN DISTRICT COURT, COUNTY OF MORTON STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,
PLAINTIFF;

v.

DANNY BIRCHFIELD,
DEFENDANT

CRIMINAL JUDGMENT

CRIMINAL NO. 30-2013-CR-01085

On March 17, 2014, by way of Rule 43 Misdemeanor Petition to Enter a Conditional Plea of Guilty, the State of North Dakota, represented by Justin Balzer, Assistant Morton County State's Attorney, and the above-named defendant, represented by counsel, Dan Herbel, agreed to disposition on this matter and the Defendant entered a conditional plea of guilty to the charge of Refusal to Submit to a Chemical Test, in violation of N.D,C.C. § 39-08-01(1)(e)(2), a Class B misdemeanor, specifically reserving the right to appeal the January 16, 2014, Order on Motion to Dismiss.

The defendant was permitted by the court to make a statement on his own behalf and to present any information in mitigation of punishment or which would require the court to withhold pronouncement of judgment and sentence and the defendant, through his Petition, knowingly and voluntarily waived these rights. The court finds no sufficient cause why judgment should not be pronounced as proffered by the parties to this action, and accordingly:

IT IS THE SENTENCE AND JUDGMENT OF THIS COURT:

IT IS ORDERED that the defendant be sentenced to serve thirty (30) days in the Morton County jail, Mandan, ND, with all but ten (10) days suspended for a period of one (1) year, and during that period the defendant shall be on unsupervised probation on the condition that Defendant have no further criminal violations. A violation of the rules or conditions may result in revocation and termination of probation, whereupon the Court may impose the maximum penalty allowed by law. As of March 17, 2014, the defendant shall be given credit for ten (10) days time served.

IT IS FURTHER ORDERED:

(a) The Defendant shall participate in the twenty-four seven sobriety program for a period of one (1) year. The Defendant shall be given credit against his one (1) year of testing beginning on October 18, 2013, and continuing through the date of this Judgment

(b) The Defendant shall obtain a substance abuse/addiction evaluation from a licensed addiction treatment facility and shall submit to the Court proof of completion of the same.

(c) The Defendant shall pay a fine in the amount of $1,500.00.

(d) The Defendant shall pay a court administration fee in the amount of $125.00.

(e) The Defendant shall pay a court facility fee in the amount of $100.00.

(f) The Defendant shall pay a $25.00 victim witness fee.

IT IS FURTHER ORDERED that due to the conditional nature of the plea of guilty, the terms of the defendant's sentence will be stayed until either a final appellate Judgment is formally entered or, if no appeal is taken, then immediately following the expiration of time to file a Notice of Appeal.

LET JUDGMENT BE ENTERED.

Dated this *20* day of March, 2014.

BY THE COURT:

/s/
HONORABLE BRUCE HASKELL
DISTRICT JUDGE, MORTON COUNTY

APPENDIX C

STATE OF NORTH DAKOTA
IN DISTRICT COURT
COUNTY OF MORTON
Case No. 30-2013-Cr-01085
State Of North Dakota,
Plaintiff,
vs.
Danny Birchfield,
Defendant

The defendant, Danny Birchfield, is charged with Refusal to Submit to On-Site Screening or Chemical Testing. Birchfield requests this Court dismiss the charge for refusing to submit to on-site screening or chemical testing. Birchfield argues the refusal charge is unconstitutional under both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution. The State resists this motion contending the Implied Consent Advisory is an appropriate legislative action and constitutional. The North Dakota Attorney General filed an amicus brief requesting the motion be denied.

LAW AND ANALYSIS

"The Fourth Amendment . . . protects from unreasonable searches and seizures." *State v. Summer*, 2011 ND 151, ¶ 9,800 N.W.2d 853. "Under the Fourth Amendment, when a person reasonably expects privacy, the government must obtain a warrant before conducting a search unless the search falls within a recognized exception to the warrant requirement." *State v. Dudley*, 2010 ND 39, ¶ 7, 779 N.W.2d 369. The extraction of blood and administration of breath tests are searches requiring either a search warrant or a valid exception. *McNeely v. Mis-*

souri, 133 S. Ct. 1552 (2013); *see also Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989). Consent to search is a recognized exception. In Birchfield's brief in support of his motion to dismiss, Birchfield argues that he had a constitutional right under the Fourth Amendment to be free from unreasonable searches and seizures, that his refusal to submit to the blood test was an exercise of his Fourth Amendment rights, and that the exercise of these rights cannot result in criminal charges against him. Birchfield cites *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) and *Camara v. Municipal Court*, 387 U.S. 523 (1967).

Birchfield argues the United States Supreme Court has never endorsed implied consent statutes that criminalize a refusal, and that *McNeely* supports his constitutionality argument. Birchfield is incorrect. In *McNeely*, the Court recognized the value of tools to enforce drunk driving laws such as implied consent statutes. Birchfield's reliance on McNeely is misplaced. In *McNeely*, the Supreme Court addressed the narrow issue of "whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk driving investigations." *McNeely*, 133 S. Ct. at 1558. The Supreme Court concluded that it did not. The Court concluded that, "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case . . . it does not do so categorically. Whether a warrantless blood test of a drunk driving suspect is reasonable must be determined case by case on the totality of the circumstances." *Id.* at 1563.

The facts in *McNeely* involved a defendant who was arrested for DUI, read the implied consent warning, refused testing, and a blood test was conducted without the defendant's consent and without a warrant. There was no attempt to obtain a warrant and no other facts presented to support finding an exigency that would have excused the warrant requirement. In this case, Birchfield was arrested for DUI, read the Implied Consent Advisory, and refused a blood test. The blood test was never performed on Birchfield so, unlike in *McNeely*, there was no Fourth Amendment Search without a warrant.

Birchfield attempts to argue *McNeely*, when read in conjunction with *Camara*, yields a different result. See *Camara v. Municipal Court*, 387 U.S. 523 (1967). This Court disagrees. In *Camara*, a building inspector attempted to gain access to the defendant's home to ensure the building's occupancy was in compliance with city code. In a limited holding, the United States Supreme Court held verification of city zoning requirements does not justify a warrantless search of the defendant's home, and the defendant should not be charged for failing to consent. The factual situations in *McNeely* and the case at hand are distinct from *Camara*. In an implied consent advisory scenario, a defendant has already granted implied consent to the search. The basis for this implied consent is grounded in a strong public policy interest of promoting public safety. In *Camara*, neither implied consent nor public safety were considered.

Birchfield also argues the North Dakota Implied Consent Advisory, which now includes language that refusal to submit to a chemical test is a crime punishable in the same manner as Driving Under the Influence, violated his constitutional rights. In

McNeely, the Court noted that states have a broad range of legal tools to enforce drunk driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. The Court states that all fifty states have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the state, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk driving offense. *Id.* at 1566. The Court noted, "[s]uch laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most states allow the motorists refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *Id.*

North Dakota is included among the states which have adopted an implied consent law (N.D.C.C. § 39-20-01) and which allows the motorist's refusal to take a BAC test to be used against him in subsequent criminal prosecution (N.D.C.C. § 39-20-08). The North Dakota Supreme Court discussed the implied consent law and the admission of a motorist's refusal to submit to a BAC test in *State v. Murphy*, 516 N.W.2d 285 (ND 1994) as follows:

> The essence of our implied consent laws is that the driver of a vehicle in North Dakota is deemed to have consented to submit to a chemical test if arrested for driving, or being in actual physical control while intoxicated. The fact that North Dakota drivers are able to refuse testing is a matter of legislative grace. Refusing to submit to the test is a legislatively granted privilege, and, as such, it is

> clear that the legislature is able to limit the extent of that privilege.

516 N.W.2d at 287 (citations omitted).

Birchfield argues that the 2013 amendments to N.D.C.C. § 39-20-01 which added the language "that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence" to the Implied Consent Advisory somehow affected his Fourth Amendment rights in this case in which he refused testing. He contends that the threat of potential criminal consequences of refusal goes beyond the constitutionally permissible "significant consequences" for refusal mentioned by the Court in *McNeely*.

This Court disagrees with Birchfield's argument. In this case, Birchfield refused the test, as he had a right to do under the existing law. Because he refused the test, the requested search, the blood draw, was not conducted. There was no search so there was no Fourth Amendment violation.

Furthermore, the addition of the language of the 2013 amendment to N.D.C.C. § 39-20-01, which imposes another potential consequence for refusal of a BAC, does not violate Birchfield's constitutional rights. Even before the 2013 amendment, N.D.C.C. § 39-20-08 provided that refusal could be used in subsequent criminal proceedings. The only difference between the current law and the previous law is that refusal can now be a separate crime and not merely evidence to prove the crime of a DUI.

The North Dakota Supreme Court discussed the purpose of N.D.C.C. Chapter 39-20 in *Krehlik v. Moore*, 542 N.W.2d 433 (N.D. 1996). The Court stated:

> In *Lund*, we recognized that the purpose of chapter 39-20, NDCC, was "to eliminate the drunken driver from the highways by requiring drivers suspected of operating motor vehicles while under the influence of intoxicating liquor to submit to a chemical test to determine the alcoholic content of their blood. Although we realize that the legislature has modified the implied consent statutes, the purpose of chapter 39-20, NDCC, has not changed since *Lund*. . . . We continue to interpret the implied consent laws "consistent[ly] with the legislature's desire for suspects to choose to take the test." Since Lund, the legislature has magnified the ramifications for refusing to submit to testing . . . . These changes reflect the legislature's desire for testing.

542 N.W.2d at 445-46 (citations omitted).

By making refusal a crime, and adding that information to the Implied Consent Advisory, the legislature has again magnified the ramifications for refusing to submit to testing. The legislature wants a driver to choose to take the test and a state may, therefore, attach penalties to a driver's choice to refuse testing. *State v. Murphy*, 527 N.W.2d 254, 256 (N.D. 1995). A driver has only a conditional right to refuse a chemical test. *Id.* With the 2013 amendments, included among the conditions imposed upon the exercise of one's right to refuse a chemical test is the potential for being charged with the crime of refusal and the admission in evidence of proof of refusal in a subsequent criminal action. Refusing to submit to the test is a legislatively granted privilege, the extent of which the legislature is able to limit. *Id.*

at 287. Adding the additional condition of the crime of refusal is consistent with the legislature's desire for DUI suspects to choose to take the test.

For these reasons, the Court determines Birchfield's Fourth Amendment rights were not violated in this case when he refused to submit to a blood test. The Defendant's Motion to Dismiss is DENIED.

Dated this 16th day of January, 2014.

BY THE COURT:

/s/
Bruce Haskell, District Judge
South Central Judicial District

CC: Dan Herbel
Justin Blazer
Ken Sorenson

APPENDIX D

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER ON PETITION FOR REHEARING

Supreme Court No. 20140109
Morton Co. No. 2013-cr-01085

State of North Dakota,
Plaintiff and Appellee
v.
Danny Birchfield,
Defendant and Appellant

This appeal having been heard by the Court at the September 2014 Term and an opinion having been filed on January 15, 2015 by:

Chief Justice Gerald W. VandeWalle, Justice Dale V. Sandstrom, Justice Carol Ronning Kapsner, Justice Daniel J. Crothers and Justice Lisa Fair McEvers;

and a petition for rehearing having been filed by Danny L. Herbel, for the Appellant, and the Court having considered the matter, it is hereby ORDERED AND ADJUDGED, that the petition be and is hereby **DENIED**.

AND IT IS FURTHER ORDERED, that this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this Court.

Dated: February 12, 2015

By the Court:

/s/

No. 14-1468

In The
Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of North Dakota

BRIEF IN OPPOSITION

BRIAN DAVID GROSINGER
Counsel of Record
Assistant State's Attorney
Morton County Courthouse
210 2nd Avenue NW
Mandan, ND 58554
Telephone (701) 667-3350
Facsimile (701) 667-3323
brian.grosinger@mortonnd.org

Counsel for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED FOR REVIEW

North Dakota is one of 13 states that make it an offense for a motorist, who has already granted implied consent to submit to chemical testing, and who has been arrested for driving under the influence, to refuse to submit to a chemical test of her blood, breath, or urine to detect the presence of alcohol. The question presented here is:

Whether North Dakota's refusal statute violates a motorist's rights under the Fourth Amendment when the motorist has impliedly consented to a chemical test but refuses to submit to a chemical test and no test is administered.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Authorities	iii
Jurisdiction	1
Statutory and Constitutional Provisions Involved	1
Statement of the Case	3
Reasons for Denying the Petition	6
I. The North Dakota Supreme Court's decision does not conflict with any decisions by other state or federal appellate courts	7
II. The North Dakota Supreme Court's decision does not conflict with any decisions by this Court	10
III. There is no pressing need for this Court to resolve the question presented	16
Conclusion	17

TABLE OF AUTHORITIES

Page

CASES

Bernard v. Minnesota, No. 14-1470 (June 16, 2015) 7

Beylund v. Levi, 859 N.W.2d 403 (N.D. 2015) 13, 14

Branti v. Finkel, 445 U.S. 507 (1980) 15

Burnett v. Municipality of Anchorage, 678 P.2d 1364 (Ala. Ct. App.), *cert. denied*, 469 U.S. 859 (1984) 8

Burnett v. Municipality of Anchorage, 806 F.2d 1447 (9th Cir. 1986) 8, 9

Camara v. Mun. Court of the City and Cnty. of San Francisco, 387 U.S. 523 (1967) 5, 12, 13

Camreta v. Greene, 131 S. Ct. 2020 (2011) 10

Doe v. United States, 487 U.S. 201 (1988) 16

Elrod v. Burns, 427 U.S. 347 (1976) 15

Hiibel v. Sixth Judicial Dist. Court of Nevada, 542 U.S. 177 (2004) 15

Koontz v. St. Johns River Water Mgmt. District, 133 S. Ct. 2586 (2013) 14

Mackey v. Montrym, 443 U.S. 1 (1979) 15

Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) 15

Missouri v. McNeely, 133 S. Ct. 1552 (2013) ..... *passim*

New York v. Class, 475 U.S. 106 (1986) 13

TABLE OF AUTHORITIES – Continued

Page

Rowley v. Commonwealth, 629 S.E.2d 188 (Va. Ct. App. 2006) 9

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) 15

South Dakota v. Neville, 459 U.S. 553 (1983) 6, 14, 16

State v. Bernard, 844 N.W.2d 41 (Minn. Ct. App. 2014) 5

State v. Bernard, 859 N.W.2d 762 (Minn. 2015) 7, 8

State v. Hoover, 916 N.E.2d 1056 (Ohio 2009), *cert. denied*, 559 U.S. 1093 (2010) 10

State v. Kordonowy, 867 N.W.2d 690 (N.D. 2015) 5

State v. Yong Shik Won, 332 P.3d 661 (Haw. Ct. App.), *cert. granted*, *State v. Yong Shik Won*, 2014 WL 2881259 (Haw. June 24, 2014) 9

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourth Amendment, United States Constitution ..... *passim*

N.D.C.C. § 27-20-13 2

N.D.C.C. § 39-08-01 ..... 4, 7

N.D.C.C. § 39-08-01(1) 4

N.D.C.C. § 39-08-01(4) 4

N.D.C.C. § 39-20-01 ..... 1, 12

N.D.C.C. § 39-20-03 2

TABLE OF AUTHORITIES – Continued

Page

Ohio Rev. Code § 4511.19(A)(2) 10

Va. Code Ann. § 18.2-268.3 9

JURISDICTION

Respondent agrees with the jurisdictional statement as contained in the Petition.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the statutory and constitutional provisions contained in this Petition, the following statutory provision is also relevant to this case:

North Dakota law, N.D.C.C. § 39-20-01 (2013) provides in relevant part:

> 1. Any individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state is deemed to have given consent, and shall consent, subject to the provisions of this chapter, to a chemical test, or tests, of the blood, breath, or urine for the purpose of determining the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath or urine. As used in this chapter, the word "drug" means any drug or substance or combination of drugs or substances which renders an individual incapable of safely driving, and the words "chemical tests" or "chemical analysis" mean any test to determine the alcohol concentration or

presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, approved by the director of the state crime laboratory or the director's designee under this chapter.

2. The test or tests must be administered at the direction of a law enforcement officer only after placing the individual, except individuals mentioned in section 39-20-03, under arrest and informing that individual that the individual is or will be charged with the offense of driving or being in actual physical control of a vehicle upon the public highways while under the influence of intoxicating liquor, drugs, or a combination thereof. For the purposes of this chapter, the taking into custody of a child under section 27-20-13 or an individual under twenty-one years of age satisfies the requirement of an arrest. The law enforcement officer shall determine which of the tests is to be used.

3. The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs; that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence; and that refusal of the individual to submit to the test directed by the law enforcement

> officer may result in a revocation for a minimum of one hundred eighty days and up to three years of the individual's driving privileges. The law enforcement officer shall determine which of the tests will be used. . . .

STATEMENT OF THE CASE

On October 10, 2013, petitioner Danny Ray Birchfield drove off of Morton County Road 139 into a ditch. North Dakota Highway Trooper Tarek Chase arrived on the scene to observe Birchfield attempting to drive out of the ditch. Trooper Chase went to Birchfield's vehicle to provide assistance. When Trooper Chase approached Birchfield he smelled a strong odor of alcohol and saw that Birchfield's eyes were bloodshot and watery. And when Trooper Chase initiated conversation, he noticed that Birchfield's speech was slurred. Trooper Chase asked Birchfield to come to his vehicle; he was unsteady on his feet trying to get to the patrol car. All of these factors led Trooper Chase to believe that Birchfield was intoxicated. At that point Trooper Chase asked Birchfield if he would be willing to submit to field sobriety testing. Birchfield agreed. Pet. App. at 2a.

Birchfield failed or performed poorly on all four tests Trooper Chase gave – the Horizontal Gaze Nystagmus, the alphabet test, the counting backwards counting test, and the finger count test. At that point Trooper Chase read Birchfield the implied-consent

advisory – *i.e.*, told Birchfield that under state law, any person who drives a car is deemed to have consented to submitting to chemical tests to measure his or her blood alcohol level – and asked him to take a preliminary breath test. Birchfield agreed to, and produced, a breath alcohol sample, which showed a .254 breath alcohol concentration. Trooper Chase then placed Birchfield under arrest for Driving under the Influence, read him his *Miranda* rights, and then read the implied-consent advisory a second time. At that point, Birchfield stated, "I'm going to refuse." Trooper Chase took this as a refusal to submit to additional tests and issued a criminal citation for refusal.

Birchfield was charged with refusing to submit to a chemical test.[1] Birchfield filed a motion to dismiss the criminal charge based on his refusal to submit to a chemical test and to find the implied-consent law unconstitutional. The District Court denied the motion, Pet. App. 22a-28a, after which Birchfield entered into a conditional plea of guilty and reserved his right

---

[1] Birchfield asserts that "[a] first refusal to consent to a chemical test qualifies as a misdemeanor under N.D.C.C. § 39-08-01(1), while subsequent offenses may qualify as a felony." Pet. 3. That statement does not fairly convey how the law operates. Under N.D.C.C. § 39-08-01(4), first and second violations under § 39-08-01 in a seven-year period are class B misdemeanors, a third offense in a seven-year period is a class A misdemeanor, and only a fourth and subsequent offense is a class C felony.

to appeal the district court's order denying his motion to dismiss. Pet. App. at 2a-2b.

On appeal, the North Dakota Supreme Court rejected Birchfield's constitutional argument and affirmed the District Court. Pet. App. 1a-18a.

The North Dakota Supreme Court specifically articulated that "implied consent laws, like North Dakota law, do not authorize chemical testing unless an officer has probable cause to believe that the defendant is under the influence, and the defendant will already have been arrested on the charge." Pet. App. 12a-13a.

The court considered this Court's opinion in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). Pet. App. 7a-9a. The court further considered the decisions of other state courts that considered refusal statutes after *McNeely*.[2] Pet. App. 9a-12a. The court also considered, and distinguished, *Camara v. Mun. Court of the City and Cnty. of San Francisco*, 387 U.S. 523

---

[2] Birchfield asserts that the North Dakota Supreme Court relied on the Minnesota intermediate appellate decision in *State v. Bernard*, 844 N.W.2d 41 (Minn. Ct. App. 2014), for the proposition that the criminal-refusal statute is constitutional whenever an officer could have secured a warrant. Pet. 5. That is not correct. This same argument was made in a subsequent case before the North Dakota Supreme Court and the court explained, "our decision in *Birchfield* was not based solely on the Minnesota Court of Appeals decision in *Bernard*." *State v. Kordonowy*, 867 N.W.2d 690, 693 (N.D. 2015). The North Dakota Supreme Court here was simply setting out the Minnesota appellate court's reasoning.

(1967). Pet. App. 12a-13a. Then, after explaining the State's preference for drivers to submit to chemical testing, the court found "[t]he criminal refusal statute satisfies the general reasonableness requirement of the Fourth Amendment." Pet. App. 16a.

REASONS FOR DENYING THE PETITION

In *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), this Court said that "States have a broad range of tools to enforce their drunk-driving laws and to secure [Blood Alcohol Content] evidence without undertaking warrantless nonconsensual blood draws." *Id.* at 1566. The very first example the Court offered was "implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Id.* And, of particular relevance here, the Court explained that "[s]uch laws impose significant consequences when a motorist withdraws consent," such as revoking the driver's license and using "the motorist's refusal to take a BAC test as evidence against him in a subsequent criminal prosecution." *Id.* Every State has enacted such a law, and these laws have long withstood legal attack. *Id.* (citing *South Dakota v. Neville*, 459 U.S. 553 (1983)).

In 13 states, the "significant consequence[ ]" of a motorist's withdrawal of consent, after he is arrested on probable cause of committing a drunk-driving

offense, is that the withdrawal is an independent offense, and in North Dakota, it is only a misdemeanor offense, unless it is for a fourth violation of N.D.C.C. § 39-08-01. Some motorists have challenged those laws, but the appellate courts – spanning cases before and after *McNeely* – have uniformly rejected those challenges. This Court's intervention is therefore not needed, and certiorari is not warranted.

I. The North Dakota Supreme Court's decision does not conflict with any decisions by other state or federal appellate courts.

Birchfield tries to create the specter of a conflict among the Courts (Pet. 11), but as his counsel concede in the reply brief in *Bernard v. Minnesota*, No. 14-1470 (filed June 16, 2015), no direct conflict exists. *See* Reply Brief, *Bernard v. Minnesota*, No. 14-1470, at 5 (Minnesota's "observ[ation] that there is no square conflict" is "correct"); *id.* at 6 ("Even absent a direct conflict in the lower courts, these erroneous rulings . . . should be corrected by this Court."); *id.* ("[E]xpress conflict or not, ...").

The reason for counsel's concession is plain: All the appellate courts that have addressed challenges to laws similar to North Dakota's implied-consent and criminal-refusal statutes have rejected them. For example, in *State v. Bernard*, 859 N.W.2d 762 (Minn. 2015), *pet. for cert. filed*, No. 14-1470, the Minnesota Supreme Court upheld Minnesota's refusal statute. After police arrested Bernard for driving

while impaired, he refused to take a breath test. Bernard alleged that Minnesota's test-refusal statute violated substantive due process and the Fourth Amendment, but the court disagreed. The court reasoned that a breath test of Bernard would have fallen with the search-incident-to-arrest exception of the Fourth Amendment. *Id.* at 766. The court then rejected Bernard's substantive due process claim, ruling that because a warrantless search of Bernard's breath incident to his arrest would have been constitutional, he had no fundamental right to refuse a constitutional search. *Id.* at 773.

The Ninth Circuit and the intermediate courts of appeals of Alaska, Hawaii, and Virginia have reached the same conclusion. The Alaska Court of Appeals and the Ninth Circuit both addressed a challenge by one Peter Burnett to Alaska's criminal-refusal statute. Burnett pleaded no contest to a charge of refusing a breathalyzer test, but reserved the right to challenge the constitutionality of the statute on appeal. On direct review, the Alaska Court of Appeals rejected his challenge after concluding that a breathalyzer is a reasonable search incident to arrest. *Burnett v. Municipality of Anchorage*, 678 P.2d 1364 (Ala. Ct. App.), *cert. denied*, 469 U.S. 859 (1984). The Ninth Circuit later rejected Burnett's request for habeas relief, holding that there is no Fourth Amendment right to refuse to submit to testing. *Burnett v. Municipality of Anchorage*, 806 F.2d 1447 (9th Cir. 1986). The court stated, "No rights were relinquished here, however, because there is no Fourth Amendment

right to refuse a breathalyzer examination." *Id.* at 1450.

The Hawaii Court of Appeals upheld that state's criminal-refusal statute in *State v. Yong Shik Won*, 332 P.3d 661 (Haw. Ct. App.), *cert. granted*, *State v. Yong Shik Won*, 2014 WL 2881259 (Haw. June 24, 2014). The court reasoned that, "[i]n balancing the government's interest against the individual's privacy interest, . . . obtaining a driver's breath test under the procedures set forth in the implied consent statute is reasonable and does not violate the Fourth Amendment." 332 P.3d at 681.

Likewise, the Virginia Court of Appeals rejected a constitutional challenge to its criminal-refusal statute, Va. Code Ann. § 18.2-268.3. *See Rowley v. Commonwealth*, 629 S.E.2d 188 (Va. Ct. App. 2006). The court recognized the general rule that a search authorized under an implied-consent statute is valid: "The general rule applies here because Rowley, like all drivers, consented to submit breath samples by exercising the legal privilege of driving on the Commonwealth's roads." *Id.* at 191. Agreeing with *Burnett*'s conclusion that there "is no Fourth Amendment right to refuse a breathalyzer examination," the court held that it follows that there is "no Fourth Amendment violation in punishing a DUI suspect for refusing to provide a breath sample under Code § 18.2-268.3." *Id.* (quoting *Burnett*, 806 F.2d at 1450).

Finally, the Ohio Supreme Court rejected a Fourth Amendment challenge to a similar statute,

Ohio Rev. Code § 4511.19(A)(2), which increased the criminal penalty that may be imposed for driving under the influence if the motorist refused to submit to a chemical test. *See State v. Hoover*, 916 N.E.2d 1056, 1060-61 (Ohio 2009), *cert. denied*, 559 U.S. 1093 (2010). The Ohio Supreme Court, noting that "the request to submit to a chemical test does not occur until after probable cause to arrest exists," held that the statute does not violate the Fourth Amendment. *Id.* at 1061.

In the end, the only purported "conflict" Birchfield can muster is different reasoning used by the lower courts in reaching the same conclusion. But "[t]his Court reviews judgments, not statements in opinions," *Camreta v. Greene*, 131 S. Ct. 2020, 2037 (2011) (internal quotation marks omitted), and the judgments have been uniform. Implied-consent and refusal laws are a longstanding part of the states' legal landscape, and their validity is well established. There is no need for this Court's intervention.

II. The North Dakota Supreme Court's decision does not conflict with any decisions by this Court.

In the end, Birchfield seeks this Court's review because he disagrees with the North Dakota Supreme Court's decision. Even if that were a sufficient basis for certiorari – and it is not – it would not justify review. The North Dakota Supreme Court's decision

is consistent with this Court's precedents interpreting the Fourth Amendment.

1. Birchfield contends that the lower court's ruling would essentially read *McNeely* "off the books." Pet. 10. That incorrectly characterizes that decision. In *McNeely*, this Court held that the natural metabolization of alcohol in the blood stream does not present a *per se* exigency that "justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." 133 S. Ct. at 1556. Rather, the "exigency . . . must be determined case by case based on the totality of the circumstances." *Id.* *McNeely*'s holding is therefore straightforward and limited – it applies only to driving-under-the-influence cases in which law enforcement, without obtaining a warrant and absent an exigency based on the totality of the circumstances, compels chemical testing after an individual has refused to submit to chemical testing.

The Court recognized, however, that "drunk driving continues to exact a terrible toll on society" and provided reassurance that "States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." 133 S. Ct. at 1565-66. In particular, the Court pointed to the fact that

> all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State,

> to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose significant consequences when a motorist withdraws consent. . . .

133 S. Ct. at 1566 (citations omitted). Nowhere in *McNeely*, therefore, did this Court hold or suggest that implied-consent and refusal laws are unconstitutional or that a State may not sanction a motorist who withdraws the consent he had impliedly given.

Leaving the North Dakota Supreme Court's decision in place would not result in "sweeping warrantless searches" (Pet. 8) because, as the court recognized, "[i]f a person refuses to submit to testing under section 39-20-01 . . . , none may be given." Pet. App. 4a. Once the person withdraws his implied consent, no search may be conducted (absent an exigency). And beyond that, the North Dakota law applies only to persons who have been arrested based on probable cause to believe they are driving under the influence – a limitation Birchfield's petition often ignores. *E.g.*, Pet. 7 ("the question [is] whether a State may criminalize a motorist's refusal to consent to a warrantless chemical search").

For similar reasons, Birchfield's reliance on *Camara v. Mun. Court of the City and Cnty. of San Francisco*, 387 U.S. 523 (1967), is misplaced. *Camara* addressed a provision of a local housing code that authorized all city employees to enter "any building, structure, or premises in the [c]ity" and made it a crime to refuse such entry. *Id.* at 526-27 (quoting

§ 503 of San Francisco Housing Code). As the North Dakota Supreme Court correctly recognized (Pet. App. 12a-13a), *Camara* is distinguishable in multiple ways.

The regulation at issue in *Camara* applied even where government officers lacked any suspicion of wrongdoing; it allowed for suspicionless searches of every building in the city. *Id.* at 526. In addition, that regulation did not involve motor vehicles, which are "the subject of pervasive regulation by the State"; "[e]very operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy." *New York v. Class*, 475 U.S. 106, 113 (1986). Further, "[u]nlike the regulation in *Camara*, the test refusal statute criminalizes the refusal to submit to a chemical test but does not authorize a warrantless search." Pet. App. 13a.

2. Birchfield also argues that North Dakota's refusal statute violates the unconstitutional conditions doctrine. Pet. 9. As an initial matter, this Court lacks jurisdiction to address that issue because Birchfield did not assert an unconstitutional conditions argument before the state courts and the North Dakota Supreme Court did not pass on that issue in this case. Rather, it first addressed whether the State's implied-consent and test-refusal statutes impose an unconstitutional condition in *Beylund v. Levi*, 859 N.W.2d 403 (N.D. 2015) (*Beylund I*). The court issued that decision *after* its decision here and stated, "[t]his Court has not previously addressed

Beylund's argument on the 'unconstitutional conditions doctrine.'" *Id.* at 409; *see also id.* at 410 ("it is a question of first impression, whether North Dakota's implied consent law represents an unconstitutional condition").

In any event, Birchfield's unconstitutional conditions argument lacks merit. Again, this Court in *McNeely* approvingly discussed state laws that "impose serious consequences when a motorist withdraws [the] consent" he impliedly gave to BAC testing, including making "an adverse inference" against the motorist "in a subsequent criminal prosecution." 133 S. Ct. at 1556 (citing *Neville*, 459 U.S. at 563-64). Birchfield fails to explain why that "serious consequence" is permissible yet the "serious consequence" North Dakota and 12 other states impose is not.

The unconstitutional conditions doctrine – which "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up," *Koontz v. St. Johns River Water Mgmt. District*, 133 S. Ct. 2586, 2594 (2013) – is therefore inapplicable. For Birchfield to prevail on this argument, he would first have to show he has a constitutional right to refuse the test even after he impliedly consented to it when he obtained his driver's license. He cannot do so here.

And even if Birchfield could show he had a constitutional right to refuse the test, his argument would still fail. The government may impose a condition where, as here, it has a "vital interest in doing

so." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 78 (1990) (citing *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976) (plurality opinion); *Branti v. Finkel*, 445 U.S. 507, 515-16 (1980)). This Court has repeatedly recognized the states' interest in public safety in removing drunk drivers from their highways. *See, e.g.*, *Mackey v. Montrym*, 443 U.S. 1, 17-18 (1979) (recognizing that the interest in public safety is substantially served by summary suspension of driver's license by those who refuse to be tested upon arrest); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."); *McNeely*, 133 S. Ct. at 1565 ("[D]runk driving continues to exact a terrible toll on our society."). North Dakota's implied-consent and refusal statutes further its vital interest in removing drunken drivers from the road.

North Dakota's implied-consent and refusal statutes are also consistent with this Court's repeated recognition that there are often consequences for not participating in searches. In *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177 (2004), this Court held that a state does not violate the Fourth Amendment by criminally punishing individuals for passively or nonviolently refusing to provide their identities to the police during a valid *Terry* stop. *Id.* at 189 (noting that "[t]he threat of criminal sanction helps ensure that the request for identity does not become a legal nullity"). States may also compel an individual to stand in a lineup or wear particular clothing, or to

produce incriminating non-testimonial evidence such as a blood sample, handwriting exemplar, or voice exemplar. *Doe v. United States*, 487 U.S. 201, 210 (1988). And in *Neville*, the Court permitted the State to use an individual's refusal to cooperate with such requests as evidence of the individual's guilt. *Neville*, 459 U.S. at 566.

North Dakota's statutory scheme fits well into this line of cases. Ultimately, "the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for the suspect to make. But the criminal process often requires suspects and defendants to make difficult choices." *Id.* at 564.

III. There is no pressing need for this Court to resolve the question presented.

Birchfield's last ground for why this Court should grant certiorari is that state test-refusal statutes are applied with considerable frequency and may impact hundreds of thousands of convictions each year. Pet. 12. The frequency of a *constitutional* practice, however, is not cause for concern. And so Birchfield's "importance" argument amounts to a repeat of his error-correction argument, namely, that the various appellate courts to have addressed criminal-refusal statutes have all gotten it wrong. As shown above, however, they have not. That these statutes are applied frequently thus shows merely that they are operating as they were designed to operate. And the fact that some other states are considering legislation

that would impose similar criminal penalties shows only that protecting citizens from drunk driving remains a large concern throughout the country, and that implied-consent and refusal laws are considered a fair and reasonable way to accomplish that objective.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted this 24th day of September, 2015.

BRIAN DAVID GROSINGER
Counsel of Record
Assistant State's Attorney
Morton County Courthouse
210 2nd Avenue NW
Mandan, ND 58554
Telephone (701) 667-3350
Facsimile (701) 667-3323
brian.grosinger@mortonnd.org

Supreme Court, U.S.
FILED
OCT 14 2015
OFFICE OF THE CLERK

No. 14-1468

In the Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Dakota

PETITIONER'S REPLY BRIEF

DAN HERBEL
Herbel Law Firm
The Regency Business Center
3333 East Broadway Ave., Suite 1205
Bismarck, ND 58501
(701) 323-0123

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

Table of Authorities ii

Reply Brief for Petitioner 1

A. Criminal compelled-consent statutes are unconstitutional. 2

1. Consent that is coerced is not effective to surrender a constitutional right. 2

2. Warrantless searches may not be upheld on the theory that they are reasonable 7

B. The holding below undermines this Court's decision in *McNeely*. 8

C. Review by this Court is necessary to resolve confusion in the lower courts and correct repeated misapplication of the Fourth Amendment. 9

Conclusion 12

TABLE OF AUTHORITIES

Page(s)

Cases

Beylund v. *Levi*,
859 N.W.2d 403 (N.D. 2015) 3, 5

Burnett v. *Municipality of Anchorage*,
806 F.2d 1447 (9th Cir. 1986) 10, 11

Byars v. *State*,
336 P.3d 939 (Nev. 2014) 4

Florida v. *Jimeno*,
500 U.S. 248 (1991) 4

Koontz v. *St. Johns River Water Mgmt. Dist.*,
133 S. Ct. 2586 (2013) 4, 5, 6

Minnesota v. *Trahan*,
No. A13-0931 (Minn. Ct. App. Oct. 13, 2015) 10

Missouri v. *McNeely*,
133 S. Ct. 1552 (2013) ..... *passim*

North Dakota v. *Kordonowy*,
867 N.W.2d 690 (2015) 1

Riley v. *California*,
134 S. Ct. 2473 (2014) 8

Schmerber v. *California*,
384 U.S. 757 (1966) 3, 8, 10, 11

Schneckloth v. *Bustamonte*,
412 U.S. 218 (1973) 2, 3, 4

Skinner v. *Railway. Labor Execs.' Ass'n*,
489 U.S. 602 (1989) 7, 8

South Dakota v. *Neville*,
459 U.S. 553 (1983) 3, 6

REPLY BRIEF FOR PETITIONER

If the laws of more than a dozen States subjected people to serious criminal penalties (including years in prison and substantial fines) for refusing to consent to unconstitutional searches, there can be no doubt that those laws would violate the Fourth Amendment and that this Court's intervention would be imperative. Yet that is precisely what North Dakota, Minnesota, and eleven other States have done, making it a crime for persons suspected of driving while impaired to decline to submit to warrantless chemical tests of their blood, breath, or urine. These criminal test-refusal penalties apply even when the person prosecuted for refusal to submit to a warrantless search was not charged with—or, indeed, was *acquitted of*—driving while impaired.[1] The issue presented by these statutes therefore is a stark one: the criminal penalty here is imposed purely and simply for refusal to surrender the right to resist an unwarranted search.

We show in the petitions in this case and in *Bernard* v. *Minnesota*, No. 14-1470, that these test-refusal statutes are unconstitutional. We also show that the decisions of the state supreme courts in these cases upholding the test-refusal statutes effectively render this Court's decision in *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013), a dead letter. In nevertheless opposing review in this case, North Dakota advances three arguments: that the decision below is correct and consistent with this Court's hold-

---

[1] This prospect is not theoretical; the North Dakota Supreme Court recently upheld the test-refusal conviction of a motorist who was acquitted of driving while impaired. *North Dakota* v. *Kordonowy*, 867 N.W.2d 690, 692 (2015).

ings; that the decision will not have a significant practical effect; and that the lower courts are not in conflict on the constitutionality of compelled-consent statutes. We address these points in turn.

A. Criminal compelled-consent statutes are unconstitutional.

North Dakota places the defense of its compelled-consent statute on two grounds: that the existence of such a law makes it permissible for a State to *deem* motorists to have consented to searches of their blood, breath, or urine, eliminating any constitutional objection to the search (or to imposition of the test-refusal penalty); and that compelled consent is, in any event, consistent with the Fourth Amendment because it is reasonable. Both arguments are fatally flawed.

1. Consent that is coerced is not effective to surrender a constitutional right.

a. To begin with, "consent" as compelled by North Dakota's statute manifestly is not "consent" in the ordinary—or constitutionally effective—meaning of the word. As we showed in the petition (at 11), consent sufficient to waive a constitutional right must both be "'the product of an essentially free and unconstrained choice by its maker'" (*Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973)) and be revocable. Neither of those conditions is satisfied here.

A motorist in North Dakota *must* consent to submit to a chemical test to obtain a driver's license in the State. As we showed in the *Bernard* petition (at 25 & n.6), the ability to drive is a practical necessity for many people in our society; that need is especially acute in places like North Dakota, where mass transit options are limited and people often must

travel long distances for the necessities of everyday life. In these circumstances, someone who will be denied the ability to drive unless he or she agrees in advance to submit to a chemical search can hardly be said to have "'freely and voluntarily'" consented to such a search. *Schneckloth*, 412 U.S. at 222 (citation omitted).

In opposing review in several of *Birchfield*'s companion cases, North Dakota nevertheless maintains that the consent compelled by its statute is voluntary in the constitutional sense; relying on *South Dakota* v. *Neville*, 459 U.S. 553 (1983), the State insists that an act is not coerced simply because a person is put to a "hard choice." No. 14-1507, *Beylund* v. *Levi*, Br. In Opp. 17; see *id.* at 11-13, 16-18. That doubtless is so; not all "hard choices" involve coercion. The State's argument, however, misunderstands both *Neville* and the circumstances here.

Neville held that the *Fifth* Amendment did not preclude a State from using a motorist's test refusal against him in a subsequent DWI prosecution because *neither* of the options offered the defendant (taking a blood test or having his refusal used against him at trial) raised constitutional concerns (under *Schmerber* v. *California*, 384 U.S. 757, 760-65 (1966), there is no Fifth Amendment bar to compelled blood testing). *Neville* therefore was *not* "a case where the State ha[d] subtly coerced [the defendant] into choosing the option it had no right to compel, rather than offering a true choice." *Ibid.* But the State here does just what South Dakota did not do in *Neville*: its compelled-consent law is designed to (not-so-subtly) coerce persons to surrender their Fourth Amendment rights by criminally punishing them if they fail to do so. Consent extracted through

operation of that law, on condition of being denied the ability to engage in an activity that is essential for daily life, surely is "the result of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248.

And although "[a] necessary element of consent is the ability to limit or revoke it" (*Byars* v. *State*, 336 P.3d 939, 945 (Nev. 2014) (citing *Florida* v. *Jimeno*, 500 U.S. 248, 252 (1991))), the "consent" compelled by North Dakota law is *not* revocable. To be sure, the State notes that North Dakota will not force a motorist to submit to a search if the motorist refuses. Opp. 12. But that refusal to permit the search to go forward triggers essentially automatic criminal penalties for test refusal, substituting these refusal penalties for the ones that otherwise might apply under the driving-while-impaired statute. A driver who takes that course may not revoke exposure to the refusal penalties. Such a choice between being searched and being criminally punished for refusing to be searched is no choice at all.

b. As we also showed in the petition (at 9; see *Bernard* Pet. 24-26), these circumstances trigger application of the unconstitutional conditions doctrine, which "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013); see *id.* at 2596 (citing cases). That is exactly what is happening here: North Dakota is applying "coercive pressure"—denial of permission to drive—to force drivers to "cede [the] constitutional right" to resist a warrantless search. *Id.* at 2596. Of course, it is true that the State need not make driver's licenses available to anyone, but that is no answer to the constitu-

tional claim here; the Court has "repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights." *Ibid.*

The State makes no serious attempt to address this issue.[2] Its only response on the merits is the assertion that "[f]or [petitioner] to prevail on this argument, he would first have to show he has a constitutional right to refuse the test even after he has impliedly consented to it when he obtained his driver's license." Opp. 14. But this argument is circular; we have just shown that petitioner *does* have a constitutional right to resist a warrantless search precisely because compelled consent in these circumstances, resting on the State's effort to coerce surrender of Fourth Amendment rights, is an unconstitutional condition.

The State also contends that this Court approved compelled-consent statutes like North Dakota's in *McNeely*, where it observed that "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State," to consent to blood alcohol testing if arrested or otherwise detained on suspicion of drunk driving. Under these laws, withdrawal of consent may lead to

---

[2] The State is incorrect in contending (Opp. 13-14) that the unconstitutional conditions argument is not properly presented in this case. That doctrine necessarily is implicated by the holding below that a State may condition the right to drive on submission to a chemical test or to test-refusal penalties, and the North Dakota Supreme Court has in any event now expressly addressed, and rejected application of, the unconstitutional conditions doctrine in this context. *Beylund* v. *Levi*, 859 N.W.2d 403, 409-410 (N.D. 2015), cert. pending, No. 14-1507.

license revocation or use of the motorist's refusal to take the test "as evidence against him in a subsequent criminal prosecution." 133 S. Ct. at 1566. See Opp. 6, 11-12, 14.

The state laws described in *McNeely*, however, are qualitatively different from the *criminal* compelled-consent statutes at issue here. The laws noted in *McNeely* impose administrative penalties for test-refusal, simply suspending or revoking the license conferred by the State if the driver refuses to submit to a search.[3] Even assuming that those laws do not run afoul of the unconstitutional conditions doctrine because they reflect a "'nexus' and 'rough proportionality'" between the state-provided benefit (the right to drive) and the penalty imposed (suspension of that right) (*Koontz*, 133 S. Ct. at 2595 (citations omitted)), it should be obvious that there is a material difference between license-revocation statutes and those that lead to the essentially automatic imposition of serious criminal penalties. In the latter set of statutes, there is a very attenuated nexus, and *no* proportionality, between the benefit (the right to drive) and the penalty (criminal fines and imprisonment for test refusal). In fact, we are not aware of *any* case where this Court has upheld a State's imposition of criminal sanctions to penalize an individual's refusal to surrender a constitutional right. If States may ex-

---

[3] As *McNeely* noted, States also have allowed test refusal to be used as evidence of guilt in a prosecution for driving while impaired. But at least as applied in *Neville*, these statutes raise no unconstitutional-conditions concern because they do not require surrender of *any* constitutional right. See *Neville*, 459 U S. at 563. Here, in contrast, the State requires surrender of the Fourth Amendment right to resist a warrantless search from persons who would drive in North Dakota.

ercise such extraordinary power consistent with the Constitution, it should only be with this Court's approval.

2. Warrantless searches may not be upheld on the theory that they are reasonable.

The State's other defense of its statute rests on the contention that the law is constitutional because "North Dakota's implied-consent and refusal statutes further its vital interest in removing drunk drivers from the road." Opp. 15. But this plainly is not a supportable legal argument. As the plurality explained in *McNeely*, "the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake." 133 S. Ct. at 1564. Specifically addressing "the compelling governmental interest in combating drunk driving," the plurality added: "the general importance of the government's interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case." *Id.* at 1565. See *id.* at 1569 (Kennedy, J., concurring in part).

That conclusion followed from the general and settled understanding that a warrantless search is permissible "only if it falls within a recognized exception" to the warrant requirement. *McNeely*, 133 S. Ct. at 1558. See *Bernard* Pet. 11, 21-22. The State, however, does not and could not suggest that any such exception applies here. And on the face of it, this is not a case where "special needs, *beyond the normal need for law enforcement*, make the warrant and probable-cause requirement impracticable." *Skinner* v. *Railway. Labor Execs.' Ass'n*, 489 U.S.

602, 619 (1989) (emphasis added; citation and internal quotation marks omitted). The State has nothing at all to say in response to these points.

The State also does not advance its argument by emphasizing that its compelled-consent statute applies only to persons who have been arrested on probable cause. Opp. 12. That typically is the situation in test-refusal cases—and was in *McNeely* itself, where the Court *rejected* the State's argument "that so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain a blood sample without a warrant." 133 S. Ct. at 1560. In fact, as we show in the petition (at 10), it is fundamental that, probable cause and arrest or not, the interpolation of a neutral magistrate between citizen and law enforcement officer is essential before a search is conducted. See *Schmerber*, 384 U.S. at 770; *Riley* v. *California*, 134 S. Ct. 2473, 2493 (2014). That principle disposes of the State's argument in this case.

B. The holding below undermines this Court's decision in *McNeely*.

South Dakota also appears to question the substantial practical effect of the rule applied below. Opp. 12. But the significant implications of the holdings in this case and in *Bernard* are beyond serious dispute.

As we show in the petition in *Bernard* (at 15), that decision's search-incident-to-arrest holding makes the decision in *McNeely* a dead letter; the dissenters in *Bernard* demonstrate that the Minnesota Supreme Court's holding "nullifies the warrant requirement in nearly every drunk-driving case" (*Ber-*

nard Pet. App. 22a)—and that will be true even if the holding in *Bernard* is limited to breath tests (see *Bernard* Pet. Repl. Br. 2-3). Neither Minnesota in *Bernard*, nor North Dakota here, denies that this is so. That being the case, whether the holding in *Bernard* is correct is a question of national significance. Many jurisdictions have agreed that warrantless chemical tests may be required under the search-incident-to-arrest doctrine (see *Bernard* Pet. 26-27), and more can be expected to follow Minnesota. The *McNeely* rule will have no practical application in all of these jurisdictions.

North Dakota nevertheless appears to contend that the decision in *this* case will not undermine *McNeely*, evidently because motorists in that State may refuse to submit to a chemical test—albeit on pain of criminal penalties under the compelled-consent statute. Opp. 11. But here again, the State assumes its conclusion. *McNeely* holds that, absent a showing of case-specific exigent circumstances, a motorist may not be subjected to a warrantless chemical test. North Dakota's test-refusal statute is specifically designed to coerce motorists into surrendering that constitutional right. Insofar as the statute's coercive force is effective, it vitiates the right recognized in *McNeely*; insofar as it is not, it subjects motorists to criminal penalties for exercising the right recognized in *McNeeley*.

C. Review by this Court is necessary to resolve confusion in the lower courts and correct repeated misapplication of the Fourth Amendment.

Finally, the State asserts that review is unnecessary because no court has held compelled-consent statutes like North Dakota's unconstitutional. Opp.

7-10. But as we explain in the reply in *Bernard* (at 5-7), this observation does not eliminate the need for review, for several reasons.[4]

First, as we showed in the *Bernard* reply (at 6 & n.4), the courts that have upheld compelled-consent statutes have used differing and inconsistent rationales, at times expressly rejecting each others' approaches as "contrary to basic principles of Fourth Amendment law." *Bernard*, Pet. App. 7a. That the courts cannot agree on the governing principle—and that they believe that the other courts have gotten that principle wrong—shows, at a minimum, that the law is in a state of considerable confusion, while offering substantial reason to believe that the holdings of *all* these courts are incorrect.

Second, the handful of decisions cited by North Dakota hardly show that the law in this area is settled. In fact, at least one of those decisions endorses an approach that is flatly inconsistent with this Court's doctrine. In *Burnett* v. *Municipality of Anchorage*, 806 F.2d 1447, 1450 (9th Cir. 1986), the Ninth Circuit relied on *Schmerber* to uphold a compelled chemical test on the theory that "there is no Fourth Amendment right to refuse" such a search.

---

[4] In fact, Minnesota's intermediate court of appeals very recently held that a compelled-consent statute *does* violate the Fourth Amendment as applied to *blood* tests, reading the Minnesota Supreme Court's holding in *Bernard* as permitting only unwarranted *breath* tests. *Minnesota* v. *Trahan*, No. A13-0931 (Minn. Ct. App. Oct. 13, 2015). This decision—which leaves undisturbed *Bernard*'s application of the search-incident-to-arrest exception as permitting conviction for refusing to take an unwarranted breath test—cannot be reconciled with the decision below in this case and confirms the pervasive confusion in the courts on the question presented here.

But in *McNeely*, the Court read *Schmerber* to stand for just the opposite proposition: "'absent an emergency, [a warrant is] required where intrusions into the human body are concerned,' even when the search was conducted following a lawful arrest." 133 S. Ct. at 1558 (quoting *Schmerber*, 384 U.S. at 770). If anything, the *Burnett* decision accordingly confirms the need for review by this Court. Meanwhile, the other decisions cited by North Dakota rest on the same set of inconsistent and conflicting rationales that we describe in the *Bernard* reply.

Third, as we also argue in *Bernard*, clarity in the law here is essential. North Dakota acknowledges that compelled-consent statutes are applied many tens of thousands of times each year in jurisdictions across the Nation, and that States are continuing to consider the enactment of such laws. Opp.6-17. All agree that impaired driving is a societal problem of tremendous importance that the States must be able to address with clear, effective, and lawful "rules, procedures, and protocols." *McNeeley*, 133 S. Ct. at 1569 (Kennedy, J., concurring in part). Yet the decision below further confuses the law, failing to grapple with the governing principles articulated by this Court. For all of these reasons, immediate review by this Court of the decision below and of the Minnesota Supreme Court's decision in *Bernard* is warranted.

CONCLUSION

For these reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DAN HERBEL
Herbel Law Firm
The Regency Business Center
3333 East Broadway Ave., Suite 1205
Bismarck, ND 58501
(701) 323-0123

EUGENE R. FIDELL
Yale Law School
*Supreme Court Clinic**
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

OCTOBER 2015

---

* The representation of petitioner by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

No. 14-1468

In the Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Dakota

BRIEF FOR PETITIONER

DAN HERBEL
Herbel Law Firm
The Regency Business Ctr.
3333 East Broadway Ave.
Suite 1205
Bismarck, ND 58501
(701) 323-0123

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

QUESTION PRESENTED

Whether, in the absence of a warrant, a State may make it a crime for a driver to refuse to take a chemical test to detect the presence of alcohol in the driver's blood.

TABLE OF CONTENTS

Question Presented i
Table of Authorities iv
Opinions Below 1
Jurisdiction 1
Constitutional and Statutory Provisions Involved 1
Statement 3
Summary of Argument 8
Argument 11
A. The Fourth Amendment prohibited a warrantless search in this case. 12
1. Warrantless searches are impermissible in the absence of a recognized exception to the warrant requirement 12
2. No exception to the warrant requirement is applicable in this case. 14
B. North Dakota's criminal refusal statute is indefensible under any theory of consent. 20
1. The statute does not produce actual consent. 21
2. The State may not "deem" consent to be given. 24
C. North Dakota may not condition permission to drive on surrender of the right to resist an unconstitutional search. 29
1. The State may not criminalize the assertion of Fourth Amendment rights. 30

2. The State may not condition the grant of a benefit on submission to criminal penalties for failure to surrender a constitutional right.....32

D. Criminal refusal laws are less effective in combating impaired driving than are many constitutional, alternative remedies. 40

Conclusion 47

TABLE OF AUTHORITIES

Cases

Arizona v. *Gant*,
556 U.S. 332 (2009) 13

Autor v. *Pritzker*,
740 F.3d 176 (D.C. Cir. 2014) 34

Byars v. *State*,
336 P.3d 939 (Nev. 2014) 25

Camara v. *Mun. Court of San Francisco*,
387 U.S. 523 (1967) ..... *passim*

City of Los Angeles v. *Patel*,
135 S. Ct. 2443 ..... *passim*

Coolidge v. *New Hampshire*,
403 U.S. 443 (1971) 20

Culombe v. *Connecticut*,
367 U.S. 568 (1961) 21

Dolan v. *City of Tigard*,
512 U.S. 374 (1994) ..... *passim*

Ferguson v. *City of Charleston*,
532 U.S. 67 (2001) 16

Flonnory v. *State*,
2015 WL 374879 (Del. 2015) 25

Frank v. *Maryland*,
359 U.S. 360 (1959) 32

Frost & Frost Trucking Co. v. *R.R. Comm'n*,
271 U.S. 583 (1926) 34

Georgia v. *Randolph*,
547 U.S. 103 (2006) 21

Cases—continued

Gerstein v. *Pugh*,
420 U.S. 103 (1975) 29

Harris v. *McRae*,
448 U.S. 297 (1980) 36

Johnson v. *United States*,
333 U.S. 10 (1948) 12

Katz v. *United States*,
389 U.S. 347 (1967) 13

Koontz v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) ..... *passim*

Lexecon Inc. v. *Milberg Weiss Bershad Hynes & Lerach*,
523 U.S. 26 (1998) 22

Lyng v. *Castillo*,
477 U.S. 635 (1986) 36, 52

Marshall v. *Barlow's, Inc.*,
436 U.S. 307 (1978) 18, 26-28

Maryland v. *King*,
133 S. Ct. 1958 (2013) 18

Michigan Det. of State Police v. *Sitz*,
496 U.S. 444 (1990) 17, 47

Missouri v. *McNeely*,
133 S. Ct. 1552 (2013) ..... *passim*

Nat'l Treas. Emp. Union v. *Von Raab*,
489 U.S. 656 (1989) 17

Nollan v. *California Coastal Com'n*,
483 U.S. 825 (1987) 36, 37

Cases—continued

Perry v. *Sindermann*,
408 U.S. 593 (1972) 35, 36

Reeder v. *State*,
428 S.W.3d 924 (Tex. App. 2014) 25

Riley v. *California*,
134 S. Ct. 2473 (2014) ..... *passim*

Rutan v. *Republican Party of Ill.*,
497 U.S. 62 (1990) 34

Schmerber v. *California*,
384 U.S. 757 (1966) ..... *passim*

Schneckloth v. *Bustamonte*,
412 U.S. 218 (1973) 20-24

See v. *City of Seattle*,
387 U.S. 541 (1967) 32

Shapiro v. *McManus*,
136 S. Ct. 450 (2015) 22

Sherbert v. *Verner*,
374 U.S. 398 (1963) 35, 36

Skinner v. *Ry. Labor Exec. Ass'n*,
489 U.S. 602 (1989) ..... *passim*

South Dakota v. *Dole*,
483 U.S. 203 (1987) 35

South Dakota v. *Neville*,
459 U.S. 553 (1983) 23, 24, 40

Speiser v. *Randall*,
357 U.S. 513 (1958) 35, 36

State v. *Arrotta*,
339 P.3d 1177 (Idaho 2014) 25

Cases—continued

State v. *Bernard*, 844 N.W.2d 41
(Minn. Ct. App. 2014) 7

State v. *Bernard*,
859 N.W.2d 762 (Minn. 2015) 7

State v. *Butler*,
302 P.3d 609 (Ariz. 2013) 25, 44

State v. *Declerck*,
317 P.3d 794 (Kan. Ct. App. 2014) 25

State v. *Fierro*,
853 N.W.2d 235 (S.D. 2014) 25

State v. *Halseth*,
339 P.3d 368 (Idaho 2014) 25

State v. *Kordonowy*,
867 N.W.2d 690 (N.D. 2015) 3

State v. *Murphy*,
516 N.W.2d 285 (N.D. 1994) 25

State v. *Won*,
361 P.3d 1195 (Haw. 2015) 3

State v. *Wulff*,
337 P.3d 575 (Idaho 2014) 25

Steward Mach. Co. v. *Davis*,
301 U.S. 548 (1937) 36

Terry v. *Ohio*,
392 U.S. 1 (1968) 12

Thomas v. *Review Bd.*,
450 U.S. 707 (1981) 36

United States v. *Brown*,
2013 WL 5604589 (D. Md. 2013) 25

Cases—continued

United States v. *Jackson*,
390 U.S. 570 (1968) 39

United States v. *Martinez-Fuerte*,
428 U.S. 543 (1976) 17

United States v. *Mendenhall*,
446 U.S. 544 (1980) 21

Vernonia School Dist. 47J v. *Acton*,
515 U.S. 646 (1995) 13, 17

Williams v. *State*,
167 So.3d 483 (Fla. Ct. App. 2015) 25

Statutes & Rules

28 U.S.C. § 1257(a) 1

Ala. Rule Crim. Proc. 2.3(c) 42

Ala. Rule Crim. Proc. 3.8(b) 42

Alaska Stat. § 12.35.015 42

Alaska Stat. § 28.35.032 3

Ariz. Rev. Stat. Ann. § 13-3914 42

Ariz.Rev.Stat. Ann. § 13-3915 42

Ark. Code Ann. § 16-82-201 42

Cal. Penal Code Ann. § 1526(b) 42

Colo. Rule Crim. Proc. 41(c)(3) 42

Fla. Stat. Ann. § 933.07 42

Fla. Stat. § 316.1932 3

Ga. Code Ann. § 17-5-21.1 42

Haw. Rev. Stat. § 291e-68 3

Statutes & Rules—continued

Idaho Code § 19-4404 42
Idaho Code § 19-4406 42
Ind. Code. § 9-30-7-5 3
Ind. Code § 35-33-5-8 42
Iowa Code § 321J.10(3) 42
Iowa Code § 462A.14D(3) 42
Kan. Stat. Ann. § 8-1025 3
Kan. Stat. Ann. § 22-2502(a) 42
Kan. Stat. Ann. § 22-2504 42
La. Code Crim. Proc. Ann., Arts. 162.1 42
La. Stat. Ann. § 14:98.7 3
Mich. Comp. Laws Ann. § 780.651 42
Minn. Rule Crim. Proc. 33.05 42
Minn. Rule Crim. Proc. 36.01 42
Minn. Stat. § 169A.24, subd. 2 49
Minn. Stat. § 169A.276, subd. 1(a) 49
Mo. Ann. Stat. § 542.276.2(1) 43
Mo. Ann. Stat. § 542.276.3 43
Mont. Code Ann. § 46-5-221 42
Mont. Code Ann. § 46-5-222 42
N.C. Gen. Stat. Ann. § 15A-245(a)(3) 42
N.D. Code § 39-06.1-11 46
N.D. Code § 39-06.2-10.2 ..... 2, 3
N.D. Code § 39-08-01 ..... 1, 5, 47, 49

Statutes & Rules—continued

N.D. Code § 39-10-01.1 28
N.D. Code § 39-19-03 28
N.D. Code § 39-20-01 ..... *passim*
N.D. Code § 39-20-14 ..... 2, 3
N.D. R. Crim. P. 41(c)(2) 29, 42
N.H. Rev. Stat. Ann. § 595-A:4-a 42
N.J. Rule Crim. Proc. 3:5-3(b) 42
N.M. Rules Crim. Proc. 5-211 42
Ohio Rules Crim. Proc. 41(C) 42
N.Y. Crim. Proc. Law Ann. § 690.35(1) 42
N.Y. Crim. Proc. Law Ann. § 690.36(1) 42
N.Y. Crim. Proc. Law Ann. § 690.40(3) 42
N.Y. Crim. Proc. Law Ann. § 690.45 42
Neb. Rev. Stat. § 29-814.01 42
Neb. Rev. Stat. § 29-814.03 42
Neb. Rev. Stat. § 29-814.05 42
Neb. Rev. Stat. § 60-6,197 3
Neb. Rev. Stat. § 60-6,211.02 3
Nev. Rev. Stat. § 179.045 42
Okla. Stat. Ann., Tit. 22, § 1223.1 42
Ore. Rev. Stat. § 133.545 42
Pa. Rules Crim. Proc. 203(A) 42
R.I. Gen. Laws § 31-27-2.1 3
S.D. Codified Laws § 23A-35-4.2 42

Statutes & Rules—continued

S.D. Codified Laws § 23A-35-5 42

S.D. Codified Laws § 23A-35-6 42

Tenn. Code Ann. § 55-10-406 3

Utah Rule Crim. Proc. 40(l) 42

Va. Code Ann. § 18.2-268.3 3

Va. Code Ann. § 19.2-54 42

Vt. Stat. Ann. tit. 23, § 1201 3

Vt. Rule Crim. Proc. 41 42

Wash. Super. Ct. Crim. Rule 2.3(c) 42

Wis. Stat. § 968.12(3) 42

Wyo. Stat. Ann. § 31-6-102(d) 42

Miscellaneous Sources

2 W. LaFave, Search and Seizure § 4.3(b) (4th ed. 2004) 42

Drunk Driving Laws, Governors Highway Safety Ass'n (Dec. 2015), perma.cc/2M39-CULF 46

Drunk Driving US Map, Ctrs. for Disease Control & Prevention (Jan. 21, 2015), perma.cc/P5KM-J2ZZ 44

Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. (1988) 34

Diana Hegyl, *iCISng eSearch Warrant Application*, Jud. Branch News 6 (Mar. 2013), perma.cc/BR6L-EB3S 44

Miscellaneous Sources—continued

Increased Penalties for High Blood Alcohol Content, Nat'l Conference of State Legislators (Oct. 14, 2015), perma.cc/2ZUD-TKS8 46

Nat'l Highway Traffic Safety Admin., *Countermeasures that Work: A Highway Safety Countermeasures Guide for State Highway Safety Offices* (7th ed. 2013), perma.cc/C5N3-LQJ6 44

Nat'l Highway Traffic Safety Admin., *Traffic Safety Facts, Breath Test Refusals and Their Effect on DWI Prosecutions* (2012),perma.cc/LN5Q-K85Z 42

Nat'l Highway Traffic Safety Admin., *Use of Warrants for Breath Test Refusal: Case Studies* (2007), perma.cc/3XKN-YA2K 45

Nat'l Highway Traffic Safety Admin., *Evaluation of State Ignition Interlock Programs: Interlock Use Analyses from 28 States, 2006-2011* (2015), perma.cc/P6AG-4HUG 46

Notice to the Bar, New Jersey Supreme Court (Nov. 14, 2013), perma.cc/B5BY-QF84 44

Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989) 34

U.S. Census Bureau, *Commuting in the United States: 2009*, perma.cc/4N9Y-8LBR 23

U.S. Department of Transportation, *Beyond Traffic 2045: Trends and Choices*, perma.cc/N66B-BRUU 23

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of North Dakota (Pet. App. 1a-18a) is reported at 858 N.W.2d 302. The decision of the North Dakota District Court (Pet. App. 22a-28a) is unreported.

JURISDICTION

The judgment of the Supreme Court of North Dakota was entered on January 15, 2015. That court denied petitioner's motion for rehearing on February 12, 2015. On May 5, 2015, Justice Alito extended petitioner's time to file a petition for certiorari until June 12, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause * * *.

North Dakota law, N.D. Code § 39-08-01, pro- vides in relevant part:

1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply: * * *

e. That individual refuses to submit to any of the following:

(1) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-06.2-10.2 if the individual is driving or is in actual physical control of a commercial motor vehicle; or

(2) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-20-01; or

(3) An onsite screening test, or tests, of the individual's breath for the purpose of estimating the alcohol concentration in the individual's breath upon the request of a law enforcement officer under section 39-20-14.

* * *

2. a. An individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state who refuses to submit to a chemical test, or tests, required under section 39-06.2-10.2, 39-20-01, or 39-20-14, is guilty of an offense under this section.

* * *

3. An individual violating this section or equivalent ordinance is guilty of a class B misdemeanor for the first or second offense in a seven-year period, of a class A misdemeanor for a third offense in a seven-year period, and of a class C felony for any fourth or subsequent offense within a fifteen-year period.

STATEMENT

North Dakota and Minnesota criminalize a driver's refusal to submit to a warrantless chemical test of his or her blood, breath, or urine to detect the presence of alcohol.[1] Under these test-refusal statutes, refusal to submit to a test is a crime wholly independent of the substantive offense of driving while impaired. A person may be convicted of test refusal even if he or she is not charged with a driving offense, as was the case with the petitioner here. Indeed, a person may be convicted of test refusal even if he or she is acquitted on an impaired-driving charge.[2]

---

[1] Eleven other States have similar statutes: Alaska (Alaska Stat. § 28.35.032); Florida (Fla. Stat. § 316.1932); Hawaii (Haw. Rev. Stat. § 291e-68); Indiana (Ind. Code. § 9-30-7-5); Kansas (Kan. Stat. Ann. § 8-1025); Louisiana (La. Stat. Ann. § 14:98.7); Nebraska (Neb. Rev. Stat. §§ 60-6,197, 60-6,211.02); Rhode Island (R.I. Gen. Laws § 31-27-2.1); Tennessee (Tenn. Code Ann. § 55-10-406); Vermont (Vt. Stat. Ann. tit. 23, § 1201(b), (c)); and Virginia (Va. Code Ann. § 18.2-268.3). The Supreme Court of Hawaii recently held Hawaii's compelled-consent statute unconstitutional. *State* v. *Won*, 361 P.3d 1195, 1198-1199 (Haw. 2015).

[2] This prospect is not theoretical; the North Dakota Supreme Court recently upheld the test-refusal conviction of a motorist who was acquitted of driving while impaired. *State* v. *Kordonowy*, 867 N.W.2d 690, 692 (N.D. 2015).

In affirming convictions for violations of these test-refusal statutes, state courts have invoked a variety of justifications: that such test requirements are per se reasonable; that motorists may be deemed to have consented to the administration of a warrantless test; and that such tests may be treated as routine searches incident to arrest, which are excepted from the Fourth's Amendment's warrant requirement. The court below, in this case and in *Beylund* v. *Levi*, No. 14-1507 (cert. granted Dec. 11, 2015), relied on the first two of these theories; the Minnesota Supreme Court in *State* v. *Bernard*, No. 14-1470 (cert. granted Dec. 11, 2015), relied on the third.

All three rationales, however, are fatally flawed. They ignore or misunderstand this Court's Fourth Amendment decisions, while robbing this Court's holding in *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013), of all practical import. And ultimately, they stand for the extraordinary proposition that persons may be subjected to criminal penalties for asserting their constitutional right to resist a search that is not supported by a warrant or an exception to the warrant requirement. Such decisions should not stand.

Although the issues in this case, *Bernard*, and *Beylund* overlap to some degree, we have attempted to avoid duplication in the briefing. Legal issues common to the three cases are addressed in this brief; petitioners' briefs in *Bernard* and *Beylund* address questions unique to those cases.

1. In North Dakota, "[a]ny individual who operates a motor vehicle" on any public or private road in the state is deemed to have "consent[ed], and shall consent, * * * to a chemical test, or tests, of the blood, breath, or urine for the purpose of determining the alcohol concentration * * * in the individual's blood, breath, or

urine." N.D. Code § 39-20-01(1). In 2013, North Dakota amended this statute to make "refusal to take the test directed by the law enforcement officer * * * a crime punishable in the same manner as driving under the influence." Pet. App. 26a; see N.D. Code § 39-08-01(2)-(a).[3] A first refusal to consent qualifies as a misdemeanor, with escalating penalties for further refusals; fourth and subsequent refusals over a fifteen-year period are treated as felonies. N.D. Code § 39-08-01(3).

2. Here, after petitioner drove his car off the road, he failed a field sobriety test administered by a highway patrol officer. Pet. App. 2a. A preliminary breath test suggested that petitioner was intoxicated, and the officer placed petitioner under arrest and read him the State's mandatory implied consent advisory. *Ibid.* This advisory informed petitioner "that North Dakota law requires [him] to take [a chemical alcohol] test to determine whether [he] is under the influence of alcohol or drugs," and "that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence." N.D. Code § 39-20-01(3)(a); see Pet. App. 2a, 5a. Petitioner nonetheless refused to submit to a blood test. Pet. App. 2a, 24a, 26a. He was charged with refusal to submit to a chemical test, but not with driving under the influence. *Id.* at 2a.

Petitioner moved to dismiss the charge, asserting that it is "unconstitutional" under the Fourth Amend-

---

[3] Criminal sanctions for test refusal are possible if, among other enumerated circumstances, an officer places a motorist "under arrest and inform[s] that individual that the individual is or will be charged with the offense of driving * * * while under the influence of intoxicating liquor." N.D. Code § 39-20-01(2).

ment for a State to criminalize refusal to submit to a chemical test of a driver's blood. Pet. App. 22a. The state district court denied his motion. *Id.* at 22a-28a. The court reasoned that "[i]n an implied consent advisory scenario, a defendant has already granted implied consent to the search" and, further, that "[t]he basis for this implied consent is grounded in a strong public interest of promoting public safety." *Id.* at 24a. The court added that because petitioner "refused the test, the requested search, the blood draw, was not conducted." *Id.* at 26a. In the court's view, because "[t]here was no search," "there was no Fourth Amendment violation." *Ibid.*

Following the district court's denial of his motion, petitioner conditionally pled guilty to the test-refusal offense but, as noted in the criminal judgment, "specifically reserve[d] the right to appeal" the denial of his motion to dismiss. Pet. App. 19a-21a. The court sentenced petitioner to thirty days in jail, twenty of which were suspended for one year; placed him on one year of unsupervised probation; imposed a $1,500 fine and $250 of court fees; required petitioner to participate for one year in a "twenty-four seven sobriety program"; and mandated that petitioner obtain a substance abuse/addiction evaluation. *Id.* at 20a.

3. On appeal, the Supreme Court of North Dakota affirmed. Pet. App. 1a-18a. Although the court acknowledged that "the administration of chemical tests to determine alcohol concentration is a search" for purposes of the Fourth Amendment (*id.* at 5a) it concluded that the State may prosecute an individual for failing to consent to such a warrantless search. The court appeared to rest this conclusion on two principal rationales.

First, the court opined that attaching criminal penalties to test refusal in this context is, as a general matter, reasonable. The court cited the Minnesota intermediate appellate decision in *State* v. *Bernard*, 844 N.W.2d 41, 42 (Minn. Ct. App. 2014), which reasoned that the "Fourth Amendment does not prohibit the state from criminalizing a suspected drunk driver's refusal to submit to a breath test for alcohol content when the circumstances established a basis for the officer to have alternatively pursued a constitutionally reasonable nonconsensual test by securing and executing a warrant." Pet. App. 9a (quoting *Bernard*, 844 N.W.2d at 42).[4] Here, the North Dakota court explained that its State's implied consent law does "not authorize chemical testing unless an officer has probable cause to believe the defendant is under the influence, and the defendant will already have been arrested on the charge." *Id.* at 13a. Thus, the court viewed it as reasonable to compel an individual to consent to a chemical test when an officer believes that probable cause exists to administer a breath or blood test, even when the officer does not in fact obtain a warrant to do so. The court concluded: "Criminally penalizing test refusal reduces the likelihood that drunk drivers will avoid a criminal penalty by refusing to take a test and, therefore, it is reasonable because it is an efficient tool in discouraging drunk driving." *Id.* at 16a (quotation marks omitted).

Second, the court reasoned that the entitlement to drive may be conditioned on the driver's deemed agreement to consent to a chemical test and that the

---

[4] The Supreme Court of Minnesota subsequently rejected this reasoning of the Minnesota appellate court. See *State* v. *Bernard*, 859 N.W.2d 762, 766 (Minn. 2015).

Fourth Amendment is not implicated where, as here, the State merely "criminalizes the refusal to submit to a chemical test but does not authorize a warrantless search." Pet. App. 13a; see *id.* at 12a-13a (distinguishing *Camara* v. *Mun. Court of San Francisco*, 387 U.S. 523, 540 (1967)). The court added that "the giving of the implied consent advisory informing the arrestee that refusing a chemical test is a crime does not render consent to the test involuntary" (Pet. App. 16a) because the threat of criminal action for refusal "is not unconstitutionally coercive in violation of a person's Fourth Amendment rights." *Id.* at 17a. The state supreme court—like the district court—thus appears to have taken the view that criminalizing refusal to consent to a warrantless search does not run afoul of the Fourth Amendment so long as the unconstitutional search does not in fact occur.

SUMMARY OF ARGUMENT

As a starting point, we assume all agree that a State may not subject people to criminal sanctions for exercising rights granted them by the Constitution—which means, in the context here, that a person may not face criminal penalties for refusing to submit to a search that is not authorized by a warrant or permissible under an exception to the warrant requirement. North Dakota seeks to evade that principle by arguing that a warrant was not required in this case because petitioner consented (or can be deemed to have consented) to administration of a blood test, which allows the State to prosecute petitioner for refusing to submit to the test. That argument misunderstands the nature of consent and, if accepted, would allow States to coerce the surrender of fundamental constitutional rights.

A. As a general matter, law enforcement officers may not conduct a search in the absence of a warrant, unless one of the few and well-delineated exceptions to the warrant requirement is present; that rule applies to blood tests of the sort at issue in this case. And no exceptions to the warrant requirement are present here. We show in *Bernard* that the search-incident-to-arrest exception is inapplicable. Under *McNeely*, the exigent circumstances exception does not apply. The "special needs" exception can come into play only when the justification for the search is unrelated to the State's general interest in law enforcement; yet the search would have been conducted in this case *only* as an element of an ordinary law enforcement investigation. And the State's suggestion that it would be "reasonable" to dispense with a warrant in this context because impaired driving is a serious societal problem cannot be squared with *McNeely* and a host of this Court's other decisions that have emphasized the importance of having the inferences supporting a search drawn by a neutral and detached magistrate.

B. The court below was incorrect in holding that the consent exception to the warrant requirement may fairly be invoked in this case. Whether consent was given must be determined by a consideration of all the circumstances, and consent is present only when it is the product of a free and unconstrained choice rather than of "duress or coercion."

Under that standard, it is nonsensical to suggest that petitioner *actually* consented to a warrantless blood test. State law *requires* motorists to consent. There is no basis to believe that motorists understand that they have granted consent to be tested simply by virtue of driving in North Dakota. And given the practical necessity of driving to carry out the essential

activities of daily life, consent obtained upon threat of losing the ability to drive surely is the product of duress or coercion.

Nor may the State prevail by contending that it may *deem* drivers to consent to be searched. Allowing a State to deem that an entire category of persons has consented in advance to be searched, regardless of what they actually knew or intended, would fly in the face of this Court's direction that consent must be determined based upon the totality of the circumstances. In fact, the only context in which the Court ever has accepted a version of "implied" consent under the Fourth Amendment is that of the administrative search, which is directed at a participant in one of the small number of industries that have a history of pervasive government oversight. That doctrine has no application to persons engaged in the everyday activity of driving down a public road.

C. North Dakota also may not support its compelled-consent law on the theory that States simply may condition permission to drive on motorists' mandatory advance surrender of their Fourth Amendment right to resist otherwise unconstitutional searches. This Court's decisions establish that the Constitution precludes the imposition of criminal penalties for the assertion of a constitutional right, whether or not the State purports to make acceptance of those penalties a condition on the award of a license or benefit. In the Fourth Amendment context, such penalties may be imposed only upon satisfaction of the administrative search exception to the warrant requirement.

And even assessed on its own terms, the State's rationale cannot be squared with the unconstitutional conditions doctrine. It is fundamental that the State may not grant a benefit on the condition that the recip-

ient surrender a constitutional right, thus achieving indirectly a result that it could not command directly. This is a paradigm case for application of the doctrine: North Dakota would deny permission to drive specifically to coerce drivers' into either ceding the constitutional right to resist an unwarranted search or accepting criminal penalties for asserting that right. There can be no justification for this exchange; the coercive force of the condition is apparent, while there is only a very attenuated connection between the imposition of criminal test-refusal penalties (the State's condition) and the exercise of the ability to drive (the benefit provided by the State).

D. Invalidation of compelled-consent laws will not hamper the State's efforts to combat impaired driving. In fact, the empirical evidence, including review by the National Highway Traffic Safety Administration, shows that compelled-consent laws are ineffective. States have available a wide range of other tools, including expedited warrant procedures and numerous mechanisms to keep impaired drivers from getting behind the wheel in the first place, that are more effective—not all of which currently are used by North Dakota. Use of those approaches, and not the imposition of unconstitutional penalties for the assertion of Fourth Amendment rights, is the proper answer here.

ARGUMENT

The question in this case is whether a State may impose criminal penalties on a driver who, after being arrested on suspicion of impaired driving, refuses to submit to a warrantless search. The answer to that question must turn on whether, in the circumstances, the Fourth Amendment required law enforcement officers to obtain a warrant before conducting the search at issue. If a warrant was required, the Con-

stitution surely does not allow the imposition of criminal penalties for the act of refusing to submit to an unwarranted—and therefore unconstitutional—search. And here, the State's arguments that a warrantless search would have been permissible cannot be squared with this Court's doctrine.

A. The Fourth Amendment prohibited a warrantless search in this case.

1. Warrantless searches are impermissible in the absence of a recognized exception to the warrant requirement.

The background Fourth Amendment principles that govern here are settled and not in dispute. It is fundamental that, as a general matter, law enforcement officers must, "whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968). Thus, the Court's decisions consistently "have determined that '[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, reasonableness generally requires the obtaining of a judicial warrant.'" *Riley* v. *California*, 134 S. Ct. 2473, 2482 (2014) (ellipses omitted) (quoting *Vernonia School Dist. 47J* v. *Acton*, 515 U.S. 646, 653 (1995)). "Such a warrant ensures that the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Ibid.* (quoting *Johnson* v. *United States*, 333 U.S. 10, 14 (1948)). Accord *Schmerber* v. *California*, 384 U.S. 757, 770 (1966).

Accordingly, the Court has made clear time and again that "searches conducted outside the judicial process, without prior approval by judge or magistrate,

are *per se* unreasonable under the Fourth Amendment." *Arizona* v. *Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz* v. *United States*, 389 U.S. 347, 357 (1967)). This fundamental rule is "subject only to a few specifically established and well-delineated exceptions." *Ibid.* See *Riley*, 134 S. Ct. at 2483; *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1558 (2013); *Skinner* v. *Ry. Labor Exec. Ass'n*, 489 U.S. 602, 619 (1989); *Katz*, 389 U.S. at 357.

There is, moreover, no dispute that the blood test demanded by the State in this case is a Fourth Amendment "search" of the sort that is subject to the usual warrant requirement. The Court has "long recognized that a compelled intrusion into the body for blood to be analyzed for alcohol content must be deemed a Fourth Amendment search." *Skinner*, 489 U.S. at 616 (quotation marks omitted; brackets in original).[5] A blood test "infringes an expectation of privacy that society is prepared to recognize as reasonable." *Ibid.* In fact, in a context virtually identical to that here, the Court made clear "[t]he importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt." *Schmerber* v. *California*, 384 U.S. 757, 770 (1966). Accord *McNeely*, 133 S. Ct. at 1559-1560. Therefore, absent the presence of a recognized exception to the warrant requirement, the State in this case was not entitled to demand that petitioner be subjected to a warrantless blood test. We do not understand the State to disagree with this fundamental understanding.

---

[5] The brief for petitioner in *Bernard* addresses the characteristics of breath tests.

2. No exception to the warrant requirement is applicable in this case.

Here, no exception to the warrant requirement applies.

a. The Minnesota Supreme Court in *Bernard* held that the search-incident-to-arrest exception to the warrant requirement governs in these circumstances. But neither the North Dakota Supreme Court nor the State of North Dakota in its opposition to review embraced that contention in this case. That is for good reason: As explained in petitioner's brief in *Bernard*, that exception has no application to chemical tests of blood, breath, or urine, which by definition can have no bearing on officer safety or evidence preservation—the two essential rationales for invocation of the doctrine.

b. This Court has already held, in *McNeely*, that the exigent circumstances exception to the warrant requirement does not, as a general matter, justify warrantless blood tests in the DUI setting. Although "the natural dissipation of alcohol in the blood may support a finding [that a warrantless search was acceptable] in a specific case, * * * it does not do so categorically." *McNeely*, 133 S. Ct. at 1563. Rather, whether exigency existed "in this context must be determined case by case based on the totality of the circumstances." *Id.* at 1556. Where it is possible for "police officers [to] reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id.* at 1561.

In opposing certiorari, North Dakota nevertheless appeared to contend that *McNeely* did not govern here because motorists in that State may refuse to submit to a chemical test—albeit on pain of criminal penalties

under the compelled-consent statute. Br. in Opp. 11. But this argument is circular. *McNeely* holds that, absent a showing of case-specific exigent circumstances, a motorist may not be subjected to a warrantless chemical test. North Dakota's test-refusal statute is specifically designed to coerce motorists into surrendering that constitutional right. Insofar as the statute's coercive force is effective in inducing the motorist to submit to a search, it vitiates the right recognized in *McNeely*; insofar as it is not, it subjects motorists to criminal penalties for exercising the Fourth Amendment right recognized in *McNeeley*. As we show below (at 31-33), in our discussion of *Camara* v. *Municipal Court of San Francisco*, 387 U.S. 523 (1967), such an outcome is impermissible.

c. On the face of it, this is not a case where "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Skinner*, 489 U.S. at 619 (citation and internal quotation marks omitted). The Court has recognized circumstances where "special needs" make a warrant—and, for that matter, probable cause and individualized suspicion—unnecessary to authorize a search. But the special needs exception to the warrant requirement is limited and narrowly-circumscribed; most notably, a "'special need' that [is] advanced as a justification for the absence of a warrant or individualized suspicion [must be] one divorced from the State's general interest in law enforcement." *Ferguson* v. *City of Charleston*, 532 U.S. 67, 79 (2001). As Justice Kennedy has described the special needs doctrine:

> The special needs cases [the Court has] decided do not sustain the active use of law enforcement, including arrest and prosecutions, as an integral part of a program which seeks to achieve legiti-

> mate, civil objectives. The traditional warrant and probable-cause requirements are waived in [the Court's] previous [special needs] cases *on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes.*

Id. at 88 (Kennedy, J., concurring in the judgment) (emphasis added).

Thus, in *Skinner*—the Court's leading special needs decision—the Court upheld mandatory warrantless and suspicionless blood and urine testing of specified categories of railroad employees following serious train accidents. In doing so, the Court emphasized that the testing served "'special needs' *beyond normal law enforcement.*" *Skinner*, 489 U.S. at 620 (emphasis added; citation omitted). It also pointed to a number of related considerations. Although "[a]n essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents * * * a warrant would do little to further these aims" in *Skinner* "in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program," which meant that "there [were] virtually no facts for a neutral magistrate to evaluate." *Id.* at 621-22. The need to rely for administration of the testing program in *Skinner* on private railroads that "are not in the business of investigating violations of the criminal laws" would have made imposition of a warrant requirement in such a context impracticable. *Id.* at 623. And expectations of privacy were diminished by the railroad employees' participation in an industry "that is regulated pervasively." *Id.* at 627. See *Vernonia School Dist. 47J* v. *Acton*, 515

U.S. 646 (1995); *Nat'l Treasury Emp. Union* v. *Von Raab*, 489 U.S. 656 (1989). Cf. *Michigan Det. of State Police* v. *Sitz*, 496 U.S. 444 (1990); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560 (1976).

None of those considerations, however, is present here: In the context of traffic stops, there are *no* "special needs" that justify warrantless breath tests. The test is given in this setting *only* as an element of "the normal need for law enforcement." *Skinner*, 489 U.S. at 619. The officer who arrested petitioner, of course, *was* "in the business of investigating violations of the criminal laws." *Id.* at 623. And it surely is too late in the day to maintain that driving is such an intensively regulated activity that warrants are categorically unnecessary when drivers are compelled to submit to searches; any such rule would sweep away any number of this Court's decisions, not least *McNeely* and *Schmerber*. Cf. *City of Los Angeles* v. *Patel*, 135 S. Ct. 2443, 2454 ("Over the past 45 years, the Court has identified only four industries that 'have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor.'") (ellipses omitted) (quoting *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 313 (1978)).

This context, moreover, is one where a warrant serves a clear and essential purpose. The application of blood alcohol tests plainly is "subject to the judgment of officers whose perspective might be colored by their primary involvement in the often competitive enterprise of ferreting out crime." *Maryland* v. *King*, 133 S. Ct. 1958, 1970 (2013) (citations and internal quotation marks omitted). Indeed, under the North Dakota and Minnesota statutes, the officer in the field has complete discretion both as to whether a test is administered at all and, if one is administered, whether the

test is to be of breath, blood, or urine. This is the paradigmatic situation where "discretion * * * could properly be limited by the 'interpolation of a neutral magistrate between the citizen and the law enforcement officer.'" *King*, 133 S. Ct. at 1969 (citation and brackets omitted). There is, as a consequence, no "special needs" justification for abrogation of the warrant requirement here.

d. The court below (Pet. App. 15a-16a), and the State in opposing review (Opp. Br. 15), suggested that, in light of the importance of combating impaired driving, it is "reasonable" as a general matter for law enforcement officers to undertake warrantless searches of drivers who have been arrested on probable cause for DUI. But if this is meant to invoke an exception that goes beyond the special needs doctrine, it is not a supportable argument. As the plurality explained in *McNeely*, "the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake." 133 S. Ct. at 1564. Specifically addressing "the compelling governmental interest in combating drunk driving," the plurality added: "the general importance of the government's interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case." *Id.* at 1565. See *id.* at 1569 (Kennedy, J., concurring in part) ("The [plurality's] repeated insistence * * * that every case be determined by its own circumstances is correct, of course, as a general proposition.").

In fact, it appears the Court in *McNeely* was unanimous on this point: No Justice suggested that a theory of "general reasonableness" makes invocation of the

exigent-circumstances exception unnecessary to support a search in DUI cases. To be sure, Members of the Court disagreed about the proper *application* of that exception. But all accepted that the exigent-circumstances exception was the proper focus of the inquiry. See 133 S. Ct. at 1569 (Roberts, C.J., concurring in part and dissenting in part); *id.* at 1574 (Thomas, J., dissenting).

The State does not advance its argument in this regard by emphasizing, as the court below also noted (Pet. App. 12a-13a), that North Dakota's compelled-consent statute applies only to persons who have been arrested on probable cause. See Opp. Br. 12. That typically is the situation in test-refusal cases—and was in *McNeely* itself, where the Court rejected the State's argument "that so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain a blood sample without a warrant." 133 S. Ct. at 1560. In fact, as we have shown (at 12-13, *supra*), it is fundamental that, probable cause and arrest or not, the interpolation of a neutral magistrate between individual and law enforcement officer is essential before a search is conducted. See *Riley*, 134 S. Ct. at 2482; *Schmerber*, 384 U.S. at 770.

That necessarily is so. By relying on the "general reasonableness" of DUI-related searches as a matter of public policy, the State and the court below depart from the principle of individualized assessment that lies at the core of Fourth Amendment doctrine. A routine DUI investigation, like the one in this case, is among the most ordinary of law enforcement functions and must be analyzed according to traditional Fourth Amendment principles. And under those principles, the Court's "cases have historically recognized that the

warrant requirement is 'an important working part of our machinery of government,' not merely 'an inconvenience to be somehow 'weighed' against the claims of police efficiency.'" *Riley*, 134 S. Ct. at 2493 (quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 481 (1971)). That principle disposes of the State's argument for a "general reasonableness" exception to the warrant requirement in this case.

B. North Dakota's criminal refusal statute is indefensible under any theory of consent.

The court below, and the State in opposing review, also defended compelled-consent requirements on the theory that drivers, by the act of driving, have consented in advance to the administration of a chemical test. Although the elements of this theory are in some respects obscure, the argument appears to involve two discrete submissions: that drivers *actually* have given their consent to be tested; and that, even if drivers have not given their consent in the ordinary sense of the word, the State may *deem* them to have consented to the test because they chose to drive in a State that has a compelled-consent statute. These arguments, however, cannot be squared with any common-sense—or constitutionally effective—understanding of what it means to consent.

It is of course true that a person may consent to a search for which a warrant otherwise would be required. This "'jealously and carefully drawn' exception [to the warrant requirement] recognizes the validity of searches [undertaken] with the voluntary consent of an individual possessing authority" to give it. *Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006) (citations omitted). This Court's cases teach, however, that a valid consent must be "the product of an essentially free and unconstrained choice." *Schneckloth* v. *Bustamonte*, 412 U.S.

218, 225 (1973) (quoting *Culombe* v. *Connecticut*, 367 U.S. 568, 602 (1961)). That standard is not satisfied here.

1. The statute does not produce actual consent.

The traditional consent framework is familiar. When "the State attempts to justify a search [of a person] on the basis of [the person's] consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248. The concept of "voluntariness," in this context, asks whether the individual's expression of consent was "the product of an essentially free and unconstrained choice." *Id.* at 225 (quoting *Culombe*, 367 U.S. at 602).

Consent presents a question of fact, requiring "careful scrutiny of all the surrounding circumstances." *Schneckloth*, 412 U.S. at 226. Among the circumstances that the Court previously has found relevant to the general consent inquiry are the nature of the request for consent (*id.* at 247), the environment in which the request was made (*ibid.*), the individual's intelligence and education (*id.* at 226), whether the individual fully understood what was being asked of him (*United States* v. *Mendenhall*, 446 U.S. 544, 558 (1980)), and whether the individual was "expressly told that [he] was free to decline to consent" (*ibid.*). When those factors indicate that the individual's will was overborne, his or her acquiescence in the search must be deemed nonconsensual.

Against this background, the suggestion that all drivers on North Dakota's roads *actually* consent to warrantless chemical tests is nonsensical. To begin with, there is nothing "voluntary" about the statutory

scheme. Section 39-20-01(1) states plainly that drivers on North Dakota's roads "*shall consent* * * * to a chemical test, or tests, of the blood, breath, or urine." (Emphasis added). As the Court has recognized repeatedly, "'the mandatory 'shall' normally creates an obligation.'" *Shapiro* v. *McManus*, 136 S. Ct. 450, 454 (2015) (ellipses omitted) (quoting *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)). The statutory scheme thus provides that when an officer arrests an individual on suspicion of DUI, "[t]he law enforcement officer shall inform the individual charged that North Dakota law *requires* the individual to take the test to determine whether the individual is under the influence of alcohol or drugs." N.D. Code § 39-20-01(3)(a) (emphasis added). Consent is no consent at all if the person giving it is forbidden from declining, on pain of criminal punishment.

Nor does any other factor suggest that the statutory scheme passes the traditional totality of the circumstances test. It is simply implausible to think that drivers headed eastbound along Interstate 94 understand that consent to a chemical test is being requested and necessarily given simply by virtue of their cars crossing from Montana into North Dakota. See N.D. Code § 39-20-01(1) (consent follows from "operat[ion of] a motor vehicle on a highway" within the State).

Beyond that, a driver's "consent" in this context, even if understood to follow from the act of driving, would surely be the product of "duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248. A motorist in North Dakota *must* consent to submit to a chemical test if he or she is to drive in the State. Yet the ability to drive is a practical necessity for most adults in our society; the majority of persons in the United States today are entirely dependent on their

ability to drive to commute to work, attend school, buy groceries, or visit a doctor.[6] That need is especially acute in places like North Dakota, where mass transit options are limited and people often must travel long distances for the necessities of everyday life. In these circumstances, someone who will be denied the ability to drive unless he or she agrees in advance to submit to a chemical search can hardly be said to have "'freely and voluntarily'" consented to such a search. *Id.* at 222 (citation omitted). We are not aware of any case involving remotely similar circumstances in which the Court has held consent to be voluntary.

In opposing review in *Birchfield*'s companion case, North Dakota nevertheless maintained that the consent compelled by its statute is voluntary in the constitutional sense; relying on *South Dakota* v. *Neville*, 459 U.S. 553 (1983), the State insisted that an act is not coerced simply because a person is put to a "hard choice." *Beylund* Opp. Br.17; accord *id.* at 11-13, 16-18. That doubtless is so; not all "hard choices" involve coercion. The State's argument, however, misunderstands both *Neville* and the circumstances here.

Neville held that the *Fifth* Amendment did not preclude a State from using a motorist's test refusal against him in a subsequent DUI prosecution because neither of the options offered the defendant (taking a

---

[6] The U.S. Census Bureau estimates that 86.1% of American workers—more than 100 million people—commute to work by car, truck, or van. U.S. Census Bureau, *Commuting in the United States: 2009*, perma.cc/4N9Y-8LBR. Accord U.S. Department of Transportation, *Beyond Traffic 2045: Trends and Choices*, perma.cc/N66B-BRUU ("Only about one quarter of jobs in low- and middle-skill industries in major metropolitan areas are accessible by a less-than-90-minute transit ride.").

blood test or having his refusal used against him at trial) raised constitutional concerns (under *Schmerber*, there is no Fifth Amendment bar to compelled blood testing). *Neville* therefore was not "a case where the State ha[d] subtly coerced [the defendant] into choosing the option it had no right to compel, rather than offering a true choice." 459 U.S. at 564. But the State here does just what South Dakota did not do in *Neville*: its compelled-consent law is designed to (not-so-subtly) coerce persons to surrender their Fourth Amendment rights by criminally punishing them if they fail to do so. Consent extracted through operation of that law, on condition of being denied the ability to engage in an activity that is essential for daily life, surely is "the result of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248.

2. The State may not "deem" consent to be given.

Perhaps appreciating the inapplicability of the traditional consent analysis here, the North Dakota court instead described its criminal refusal law as an "*implied* consent statute[]" (*Birchfield* Pet. App. 12a-13a), which imposes "*implied* consent requirements" on drivers (*id.* at 5a) and obligates law enforcement officers to give "*implied* consent advisor[ies]" to DUI suspects (*id.* at 9a) (all emphases added). "The essence of our implied consent laws," according to this line of reasoning, "is that the driver of a vehicle in North Dakota is deemed to have consented to submit to a chemical test if arrested for driving." *State* v. *Murphy*, 516 N.W.2d 285, 287 (N.D. 1994). Accord N.D. Code § 39-20-01(1) (all drivers on North Dakota roads are "deemed to have given consent" to chemical tests of their blood). Drivers on North Dakota roads therefore have "a diminished expectation of privacy with respect to enforcement of drunk driving laws, because [they

are] presumed to know the laws governing the operation of a motor vehicle," including the "implied consent laws." *Birchfield* Pet. App. 15a.

That line of reasoning is deeply flawed. As one state court recognized, "allowing implied-consent statutes to constitute a per se, categorical exception to the warrant requirement would make a mockery of the many precedential Supreme Court cases that hold that voluntariness must be determined based on the totality of the circumstances." *Williams* v. *State*, 167 So.3d 483, 491 (Fla. Ct. App. 2015). It also "would devour the *McNeely* rule and contradict *McNeely*'s general reasoning that these cases must be decided using a totality-of-the-circumstances approach." *Ibid.*[7]

---

[7] Since this Court's decision in *McNeely*, "[t]he vast majority of courts have found that statutory implied consent is not equivalent to Fourth Amendment consent." *Williams*, 167 So.3d at 490 & n.4 (citing cases). These courts have recognized that "an implied consent statute * * * does not justify a warrantless blood draw from a driver who refuses to consent[] * * * or objects to the blood draw * * *. Consent to a search must be voluntary. * * * Inherent in the requirement that consent be voluntary is the right of the person to withdraw that consent." *State* v. *Halseth*, 339 P.3d 368, 371 (Idaho 2014). See *State* v. *Butler*, 302 P.3d 609, 613 (Ariz. 2013); *Flonnory* v. *State*, 2015 WL 374879, at *4 (Del. 2015) (unpublished); *Byars* v. *State*, 336 P.3d 939, 945-946 (Nev. 2014) (striking down a provision of the State's implied consent law on the ground that the statute could not by itself authorize a warrantless blood draw); *State* v. *Arrotta*, 339 P.3d 1177, 1178 (Idaho 2014); *State* v. *Wulff*, 337 P.3d 575, 582 (Idaho 2014); *State* v. *Fierro*, 853 N.W.2d 235, 241 (S.D. 2014); *Reeder* v. *State*, 428 S.W.3d 924, 930 (Tex. App. 2014); *State* v. *Declerck*, 317 P.3d 794, 804 (Kan. Ct. App. 2014); *United States* v. *Brown*, 2013 WL 5604589, at *4 & n.1 (D. Md. 2013).

In fact, the only circumstance in which this Court has ever accepted a version of "implied" consent under the Fourth Amendment is in the administrative inspection context, a variant of the "special needs" exception to the warrant requirement. But that line of cases offers no support to the State.

"[T]he general administrative search doctrine" applies in a very narrow range of cases that involve businesses that "'have such a history of government oversight that no reasonable expectation of privacy could exist for a prop ietor over the stock of such an enterprise.'" *Patel*, 135 S. Ct. at 2454 (ellipses omitted) (quoting *Barlow's*, 436 U.S. at 313). Businesses engaged in "liquor sales, firearms dealing, mining, or running an automobile junkyard" are industries of this type. *Ibid.* "[W]hen an entrepreneur embarks upon such a business," the reasoning goes, "he has voluntarily chosen to subject himself to a full arsenal of governmental regulation," and thus "in effect consents to the restrictions placed upon him," including subjection to occasional random searches of the stock and premises of the business. *Ibid.* Such searches are deemed reasonable by the diminution of privacy expectations that follows from "a long tradition of close government supervision, of which any person who chooses to enter such a business [would] already be aware." *Barlow's*, 436 U.S. at 313.

This sort of "in effect consent[]" reasoning, however, has no application here.

First, as we have noted, driving is not a voluntary commercial enterprise, but a necessary aspect of daily living. Practically everywhere in the United States, and especially in heavily rural States like North Dakota, driving a car is necessary to get to town, commute to work, worship, see a doctor, or visit with

friends and family. The administrative inspection doctrine, by contrast, is based on the idea that the business person has "voluntarily chosen" to be subjected to warrantless searches. *Patel*, 135 S. Ct. at 2454. The same cannot be said when it comes to driving, which is an essential element of both personal and professional life in North Dakota and most everywhere else. Simply put, an individual's decision to drive on North Dakota's roads is not akin to an entrepreneur's decision to voluntarily open an automobile junkyard rather than a less regulated form of business.

Second, as we have suggested (at 17-18, *supra*), driving is not "closely supervised" in the sense required by the administrative inspection doctrine. Of course, to operate a vehicle in North Dakota (as in any other State), an individual must have a valid driver's license, vehicle registration, and automobile insurance—none of which must be issued by or in North Dakota. *E.g.*, N.D. Code § 39-19-03. And once on the road, operators must follow typical traffic laws. *E.g.*, N.D. Code § 39-10-01.1. But neither drivers nor their vehicles have historically been subject to warrantless "supervision and inspection" as part of that regulatory scheme. *Marshall*, 436 U.S. at 313.

Patel demonstrates why the administrative inspection rule accordingly cannot apply. At issue there was a criminal refusal statute just like the one here: Hotel operators were required to produce their hotel registries to police officers without a warrant, and "[a] hotel owner who refuse[d] to give an officer access to his or her registry [could] be arrested on the spot." 135 S. Ct. at 2452. Los Angeles attempted to justify its criminal refusal statute under the administrative inspection doctrine, pointing to regulations that required hotel operators to "maintain a license" and follow the rules of

the hotelier's road by "collect[ing] taxes, conspicuously post[ing] their rates, and meet[ing] certain sanitary standards." *Id.* at 2455. The Court roundly rejected that argument: "If such general regulations were sufficient to invoke the closely regulated industry exception, it would be hard to imagine a type of business that would not qualify." *Ibid.* Outside the narrow range of businesses that historically have been subject to warrantless inspections as part of the administrative scheme itself, "business owners cannot reasonably be put to [a] choice" between allowing a search or facing criminal punishment. *Id.* at 2452. Just so here.

Third, even when the doctrine applies, "for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *Patel*, 135 S. Ct. at 2452. That is an essential condition, because there is otherwise "an intolerable risk that searches authorized by [the statutory scheme] will exceed statutory limits." *Id.* at 2452-2453. But by design, there is no precompliance review provided under North Dakota's criminal refusal law; the officer in the field decides whether to demand a test, refusal of which triggers virtually automatic criminal penalties.

Finally, as with other special needs searches, this Court has never sanctioned administrative searches as a tool for general crime control. On the contrary, administrative inspection laws have been met with approval only where "special needs make the warrant and probable-cause requirement impracticable, and where the primary purpose of the searches is *distinguishable* from the general interest in crime control." *Patel*, 135 S. Ct. at 2452 (citations, brackets, and quotation marks omitted; emphasis added).

Neither condition is satisfied here. North Dakota's criminal refusal statute came into play in this case only after a police officer placed petitioner under arrest. See N.D. Code 39-20-01(2). The act of arrest presupposes that the officer has probable cause to believe that an offense was committed (see *Gerstein* v. *Pugh*, 420 U.S. 103, 111 (1975)); thus, requiring officers to obtain a warrant, whether "by telephone or other reliable electronic means" (N.D. R. Crim. P. 41(c)(2)), before conducting a search generally would not be impracticable. And given that the individual will already be in custody and off the road, there is no public safety rationale to justify the search—its sole purpose is to gather evidence of a suspected crime to facilitate a later prosecution.

In sum, North Dakota's criminal refusal statute is not justifiable on consent grounds. The statute cannot be understood to extract actual consent from drivers under the totality of the circumstances, nor can it be understood to extract implied consent under the Court's administrative inspection cases. Here, as in *Patel*, car drivers "cannot reasonably be put to [a] choice" between acquiescing to a breath, blood, or urine search or accepting criminal punishment. 135 S. Ct. at 2452.

C. North Dakota may not condition permission to drive on surrender of the right to resist an unconstitutional search.

Against this background, we have shown that there is no *actual* consent to be tested in this case and that the State may not *deem* consent to be present. That being so, the real basis for the North Dakota law must be, not that drivers give voluntary consent, but simply that the States may condition permission to drive on drivers' mandatory advance surrender of their Fourth

Amendment right to resist otherwise unconstitutional searches. And in fact, that rationale was an important element of the North Dakota Supreme Court's decisions upholding application of the compelled-consent statutes; the court opined in *Beylund* that "the government may lawfully impose conditions, including the surrender of a constitutional right, provided the conditions are reasonable." *Beylund* Pet. App. 12; see *id.* at 17a-19a. Such a theory cannot sustain North Dakota's compelled consent law.

1. The State may not criminalize the assertion of Fourth Amendment rights.

To begin with, the court below did not apply the proper analytical framework to the problem in this case. In our view, the Constitution categorically precludes States from attaching criminal penalties to the assertion of an otherwise applicable Fourth Amendment right, whether or not the State purports to make acceptance of those penalties a condition for awarding a license or other benefit.

That is the holding of decisions like *Patel*. There, a license was required to operate a hotel, just as it is here required to drive. See *Patel*, 135 S. Ct. at 2455. This Court could have said there, as the court below said here, that the government conditioned grant of the license to operate a hotel on the hotel owner's submission to a warrantless search. But the Court did not look at the matter in those terms. It instead inquired whether the nature of the hotel owners' activities was such as to make a warrant unnecessary under ordinary Fourth Amendment analysis. Finding no applicable exception to the warrant requirement (see *id.* at 2452-53), the Court held flatly that "[a] hotel owner who refuses to give an officer access to his or her registry" "cannot reasonably be put to the choice" between

submission to the search and "arrest[] on the spot." *Id.* at 2452.

Thus, according to *Patel*, a government may not criminalize the refusal to submit to a warrantless search in the absence of an independently applicable exception to the Fourth Amendment's warrant requirement. And *Patel* was not the first time the Court had so held. In *Camara*, a San Francisco city ordinance authorized city employees, "upon presentation of proper credentials," to enter any building in the city without a warrant. 387 U.S. at 526. Under the ordinance, "refusal to permit an inspection [was] itself a crime, punishable by fine or even by jail sentence." *Id.* at 531; see *id.* at 527 n.2 (detailing criminal penalties). Camara was convicted of a crime for violating this ordinance when he refused to permit warrantless inspection of his apartment. This Court ordered the conviction set aside, holding that Camara "had a constitutional right to insist that the inspectors obtain a warrant to search" and that he "may not constitutionally be convicted for refusing to consent to the inspection." *Id.* at 540.[8] And the Court reached an identical conclusion in *See* v. *City of Seattle*, 387 U.S. 541 (1967), where it held that the defendant "may not

---

[8] Although *Camara* involved a suspicionless search rather than one based on probable cause, what made the search defective was the lack of a warrant or other equivalent justification; the Court took issue with the search not because it was suspicionless but because it was warrantless. Indeed, the Court in *Camara* overruled a prior decision, *Frank* v. *Maryland*, 359 U.S. 360 (1959), despite the fact that the ordinance upheld in *Frank* required the inspector to "have cause to suspect" a violation before demanding entry without a warrant. *Camara*, 387 U.S. at 529 n.4 (citing *Frank*, 364 U.S. at 264, 265). By its own terms, then, *Camara* applies whether or not the State had cause to initiate the search.

be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry" into his warehouse. *Id.* at 546.

That was so even though the Court could have said that the cities in those cases had attached submission to a warrantless search as a condition on the right to live, or operate a warehouse, in the jurisdiction. The same understanding applies fully here: Petitioner may not constitutionally be convicted for refusing to submit to a blood test that is unsupported by a warrant or a valid warrant exception. If anything, the Fourth Amendment interests at stake here are more vital than they were in *Patel* or *Camara*, which involved routine inspections rather than searches that police officers sought to undertake as an element of a criminal investigation.

Of course, there may be circumstances when *compelling* justifications permit the government to override constitutional protections. See, *e.g.*, *Skinner*, 489 U.S. at 633. But this is not such a case. The Court has held, in *McNeely*, that a warrantless search in exactly this context fails to meet the standard of reasonableness at all. That being so, the State's reasons for imposing criminal penalties to force submission to a warrantless test are not in any sense "compelling."

2. The State may not condition the grant of a benefit on submission to criminal penalties for failure to surrender a constitutional right.

Although that is enough to dispose of the State's argument, it bears emphasis that the holding below is wrong on its own terms. If submission to a search or to criminal test-refusal penalties is understood to be a condition that North Dakota attaches to the ability to

drive, such a compelled surrender of a constitutional right violates the doctrine of unconstitutional conditions.

a. This Court repeatedly has recognized "an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). "In its canonical form, this doctrine holds that even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights." Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 67 (1988). The short of it is that the "'government may not grant a benefit on the condition that the beneficiary surrender a constitutional right." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989).

As the Court has long recognized, the "foundational principle" (*Autor* v. *Pritzker*, 740 F.3d 176, 182 (D.C. Cir. 2014)) underlying this doctrine is straightforward: It would be a "palpable incongruity" to strike down legislation that expressly strips a person's constitutional rights, but to uphold legislation "by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold." *Frost & Frost Trucking Co.* v. *R.R. Comm'n*, 271 U.S. 583, 593 (1926). If governments had the power to so condition the exercise of rights, the "guarantees embedded in the Constitution" could be "manipulated out of existence." *Id.* at 594.

The unconstitutional conditions doctrine gives effect to this fundamental insight, holding that what the Constitution "precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 78 (1990). The doctrine is "well-settled" (*Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994)), has been accepted by every Member of the Court (*Koontz*, 133 S. Ct. at 2594; *id.* at 2603 (Kagan, J., dissenting)), and has been applied "in a variety of contexts" (*id.* at 2594 (citing cases)).[9]

This is a paradigm case for application of the unconstitutional conditions doctrine. North Dakota is applying "the type of coercion that the unconstitutional conditions doctrine prohibits"—denial of permission to drive—to force drivers to "cede [the] constitutional right" to resist a warrantless search. *Koontz*, 133 S. Ct. at 2594, 2596. Of course, it may be true that the State need not permit anyone to drive, but that is no answer to the constitutional claim here; the Court has "repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights." *Id.* at 2596 (citing cases). "Virtually all of [the Court's] unconstitutional conditions cases involve a gratuitous governmental benefit of some kind," but the

---

[9] The North Dakota Supreme Court questioned whether the unconstitutional conditions doctrine applies to the Fourth Amendment. *Beylund* Pet. App. 13a-14a. But it is not evident why a doctrine that applies in "a variety of contexts" and rests on a general principle limiting government's authority to accomplish otherwise unconstitutional goals should be inapplicable to any constitutional provision. Cf. *Patel*, 135 S. Ct. 2449 (ruling that facial challenges under the Fourth Amendment "are not categorically barred or especially disfavored").

"greater authority" to deny a benefit altogether "does not imply a lesser power to condition [grant of the benefit] on petitioner's forfeiture of his constitutional rights." *Ibid.*

That principle is controlling here. In North Dakota, persons must either abstain from driving or "consent" in advance to exposure to heavy criminal penalties if they later refuse a chemical test—even if that test is unsupported by a warrant or a recognized exception to the warrant requirement. Like a city that uses its monopoly on land use permits to impose unconstitutional conditions on homeowners (*e.g.*, *Nollan* v. *California Coastal Com'n*, 483 U.S. 825, 837 (1987)) or a State that conditions government employment on refraining from protected speech (*e.g.*, *Perry* v. *Sindermann*, 408 U.S. 593 (1972)), these States use their regulatory authority over driving to coerce the surrender of constitutional rights.

b. There can be no doubt that the threatened denial of the right to drive is coercive in the relevant sense. The Court has recognized in related contexts that coercion exists where "pressure turns into compulsion." *South Dakota* v. *Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). To determine the coerciveness of a condition, the Court has considered whether the condition puts "substantial pressure" on the individual not to exercise his or her constitutional right. *Thomas* v. *Review Bd.*, 450 U.S. 707, 718 (1981); see, *e.g.*, *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963) (coercion where government "pressure" that is "unmistakable" "operate[s] * * * to inhibit or deter" exercise of constitutional rights); *Speiser* v. *Randall*, 357 U.S. 513, 519 (1958) (striking down a state law that conditioned eligibility for a tax exemption on willingness to sign a loyalty

oath because the regime "necessarily will have the effect of coercing the claimants to refrain from the proscribed speech"). Cf. *Lyng* v. *Castillo*, 477 U.S. 635, 638 (1986) (rejecting a challenge to termination of benefits where it was "exceedingly unlikely" individuals would change their behavior to maintain benefit levels). Such conditions "inevitably deterred or discouraged" the exercise of a constitutional right and "thereby threatened to 'produce a result which the State could not command directly.'" *Sherbert*, 374 U.S. at 405 (quoting *Speiser*, 357 U.S. at 526).

That sort of coercive pressure surely is present in this case. As we have explained, unlike some government benefits, driving is a necessity for millions of people who cannot earn a livelihood or participate meaningfully in society without it. Drivers' license suspension or revocation therefore involves more than the loss of a privilege; it effectively precludes many people from earning a living or engaging in the necessities of daily life. While "a refusal to *fund* protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity" (*Harris* v. *McRae*, 448 U.S. 297, 317 n.19 (1980) (emphasis added)), the complete incapacitation that may result from denial of an essential means of transportation surely is coercive. "Such interference with constitutional rights is impermissible." *Perry*, 408 U.S. at 597.

c. In addition, in applying the unconstitutional conditions doctrine, the Court in some circumstances—where grant of the benefit might "impose costs on the public" (*Koontz*, 133 S. Ct. at 2595)—has determined that the propriety of a government condition may turn on whether there is a "'nexus'" and "rough proportionality'" between the state-provided benefit and the condition imposed. *Ibid.* (citations omitted). See *Dolan*,

512 U.S. at 386; *Nollan*, 483 U.S. at 837. Where such nexus and proportionality are present, it is less likely that the government is attempting to "leverage its legitimate interest" to achieve "[e]xtortionate demands." *Koontz*, 133 S. Ct. at 2495.[10]

Here, that necessary connection is absent. In this case, the benefit offered by the government is the ability to drive; the condition is the surrender of the Fourth Amendment right to resist a warrantless test *on pain of the imposition of criminal penalties for refusal*. Even granting that a nexus exists between compelled-consent laws and the prevention of drunk driving—and even assuming that States permissibly could impose civil penalties such as license suspension for test refusal, a question not presented here—the North Dakota *criminal* test-refusal penalties fail the requirement of proportionality. Although "rough proportionality" does not require a "precise mathematical calculation," it does involve a more searching

---

[10] Although the Court has applied this germaneness inquiry principally in Takings Clause cases, the inquiry may have some bearing in other contexts. In explaining its "special application" of the unconstitutional conditions doctrine in the Fifth Amendment setting, the Court relied on two competing realities of the land-use permitting process: that land-use permit applicants are "especially vulnerable to the types of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit" and that, because "many proposed land uses threaten to impose costs on the public that dedications of property can offset," the State has an interest in regulating the permitting process. *Koontz*, 133 S. Ct. at 2594, 2595. Each of these realities is present, to some degree, in cases like this one: government exercises complete authority over the ability to drive on public roadways, so that it can easily pressure drivers into giving up their Fourth Amendment rights; yet irresponsible driving behaviors may impose significant public costs.

review than an equal protection rational-basis inquiry, looking to an "individualized determination that the [condition] is related both in nature and extent to the impact of the [privilege]." *Dolan*, 512 U.S. at 391. And criminal penalties for test refusal are clearly disproportionate here, for a number of reasons.

First, even assuming that the State has an interest in the warrantless chemical testing of persons suspected of DUI, there is at best a very attenuated nexus, and *no* proportionality, between the benefit (the right to drive) and the condition (criminal fines and imprisonment for test refusal). There is an insufficient state interest in subjecting persons to such penalties as a condition on their ability to drive—penalties that are imposed, after all, not for driving under the influence but for refusal to be subjected to a warrantless search. In fact, we are not aware of *any* case where this Court has upheld a State's imposition of criminal sanctions to penalize an individual's refusal to surrender a constitutional right. Cf. *Patel*, 135 S. Ct. at 2452.

Second, imposition of criminal penalties for test refusal does little to promote the government's interest. Criminalizing test refusal is unlikely to add any deterrent effect to the already harsh penalties the law places on drunk driving. And as we demonstrate below (at 41-47, *infra*), there are approaches that are more effective than criminal compelled-consent laws both at obtaining evidence for the prosecution of driving under the influence and at deterring impaired driving in the first place, including expedited warrant procedures and an extensive set of restrictions that prevent impaired drivers from getting behind the wheel. In such circumstances, where the chilling effect on the exercise of a constitutional right is "unnecessary and therefore excessive," the condition is too removed from the

benefit and cannot be supported. *United States* v. *Jackson*, 390 U.S. 570, 581 (1968) ("Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." (citation omitted)).

d. For its part, the court below made no serious attempt to explain why the unconstitutional conditions doctrine does not apply. Its principal response on the point was the suggestion that, "to proceed with a claim of unconstitutional conditions, the defendant must show the criminal refusal statute authorizes an unconstitutional search." *Beylund* Pet App. 15a; see *Birchfield* Br. in Opp. 14 ("[f]or [petitioner] to prevail on this argument, he would first have to show he has a constitutional right to refuse the test even after he has impliedly consented to it when he obtained his driver's license"). But as we demonstrate above, that is just what North Dakota's law does when it punishes a driver for failing to submit to a search in the absence of a warrant or an exception to the warrant requirement; the driver is punished for that refusal rather than tested hardly saves the State's scheme.

The State also has contended that this Court approved compelled-consent statutes like North Dakota's in *McNeely*, where it observed that "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State," to consent to blood alcohol testing if arrested or otherwise detained on suspicion of drunk driving. Under these laws, withdrawal of consent may result in the motorist's driver's license being "suspended or revoked" or use of the motorist's refusal to take the test "as evidence against him in a subsequent criminal prosecution." 133 S. Ct. at 1566. See *Birchfield* Br. in Opp. 6, 11-12, 14.

The state laws described in *McNeely*, however, are qualitatively different from the *criminal* compelled-consent statutes at issue here. The laws noted in *McNeely* impose administrative penalties for test-refusal, simply suspending or revoking the license conferred by the State if the driver refuses to submit to a search.[11] Even assuming that those laws apply in circumstances where nonconsensual searches could not constitutionally be conducted, and assuming further that the laws do not run afoul of the unconstitutional conditions doctrine because they reflect a "'nexus' and 'rough proportionality'" between the state-provided benefit (the right to drive) and the penalty imposed (suspension of that right) (*Koontz*, 133 S. Ct. at 2595 (citations omitted)), it should be obvious that there is a material difference between license-revocation statutes and those that lead to the essentially automatic imposition of serious criminal penalties. As we have explained, criminal penalties have effects that are attenuated from and disproportionate to the State's interest, in ways that simple license revocation does not.

D. Criminal refusal laws are less effective in combating impaired driving than are many constitutional, alternative remedies.

Finally, the State cannot save its statute by arguing that compelled-consent laws contribute to the

---

[11] As *McNeely* noted, States also have allowed test refusal to be used as evidence of guilt in a prosecution for driving while impaired. But at least as applied in *Neville*, these statutes raise no unconstitutional-conditions concern because they do not require surrender of *any* constitutional right. See *Neville*, 459 U.S. at 563. Here, in contrast, the State requires surrender of the Fourth Amendment right to resist a warrantless search from persons who would drive in North Dakota.

fight against impaired driving. See *Birchfield* Opp. Br. 7-8; Pet. App. 12-13. Even if compelled-consent laws were effective in advancing the State's purpose, that would not justify departure from fundamental constitutional requirements; that "[p]rivacy comes at a cost" is not a sufficient reason to disregard the mandate of the Fourth Amendment. *Riley*, 134 S. Ct. at 2493. But the fact is, the State's submission is wrong on its own terms: As the Court observed in rejecting a similar contention in *McNeely*, there is no evidence that precluding use of compelled-consent laws "will undermine the governmental interest in preventing and prosecuting drunk-driving offenses." 133 S. Ct. at 1566. This is so for several reasons.

First, compelled-consent laws like North Dakota's simply are ineffective tools with which to combat impaired driving. In *McNeely*, the Court noted that it was "aware of no evidence indicating that restrictions on nonconsensual blood testing have compromised drunk-driving enforcement efforts in the States that have them." 133 S. Ct. 1567. In fact, the evidence is to the contrary. Prosecutors obtain convictions for drunk driving at about the same rate regardless of whether or not blood alcohol concentration ("BAC") test evidence was available. Thus, results from a National Highway Traffic Safety Administration study of five different jurisdictions, some with criminal compelled-consent laws and some without, "did not indicate a clear relationship between refusing a BAC test and the probability of conviction for DWI/DUI." Nat'l Highway Traffic Safety Admin., *Traffic Safety Facts, Breath Test Refusals and Their Effect on DWI Prosecutions*, DOT HS 811 551, at i (2012), perma.cc/LN5Q-K85Z. Indeed, Bernalillo County, New Mexico, a jurisdiction with no criminal compelled-consent law, had a 2% *higher*

impaired-driving conviction rate for test refusers than for non-refusers. *Id.* at 41.

Second, as the Court also noted in *McNeely*, legal and technological developments, including procedures adopted by "[w]ell over a majority of States" that allow for remote warrant applications, "enable police officers to secure warrants more quickly." 133 S. Ct. at 1562.[12]

---

[12] Citing to: Ala. Rule Crim. Proc. 3.8(b) (2012-2013); Alaska Stat. § 12.35.015 (2012); Ariz. Rev. Stat. Ann. §§ 13-3914(C), 13-3915(D), (E) (West 2010); Ark. Code Ann. § 16-82-201 (2005); Cal. Penal Code Ann. § 1526(b) (West 2011); Colo. Rule Crim. Proc. 41(c)(3) (2012); Ga. Code Ann. § 17-5-21.1 (2008); Haw. Rules Penal Proc. 41(h)-(i) (2013); Idaho Code §§ 19-4404, 19-4406 (Lexis 2004); Ind. Code § 35-33-5-8 (2012); Iowa Code §§ 321J.10(3), 462A.14D(3) (2009) (limited to specific circumstances involving accidents); Kan. Stat. Ann. §§ 22-2502(a), 22-2504 (2011 Cum. Supp.); La. Code Crim. Proc. Ann., Arts. 162.1(B), (D) (West 2003); Mich. Comp. Laws Ann. § 780.651-(2)-(6) (West 2006); Minn. Rules Crim. Proc. 33.05, 36.01-36.08 (2010 and Supp.2013); Mont. Code Ann. §§ 46-5-221, 46-5-222 (2012); Neb. Rev. Stat. §§ 29-814.01, 29-814.03, 29-814.05 (2008); Nev. Rev. Stat. § 179.045(2), (4) (2011); N.H. Rev. Stat. Ann. § 595-A:4-a (Lexis Supp. 2012); N.J. Rule Crim. Proc. 3:5-3(b) (2013); N.M. Rules Crim. Proc. 5-211(F)(3), (G)(3) (Supp. 2012); N.Y. Crim. Proc. Law Ann. §§ 690.35(1), 690.36(1), 690.40(3), 690.45(1), (2) (West 2009); N.C. Gen. Stat. Ann. § 15A-245(a)(3) (Lexis 2011); N.D. Rules Crim. Proc. 41(c)(2)-(3) (2012-2013); Ohio Rules Crim. Proc. 41(C)(1)-(2) (2011); Okla. Stat. Ann., Tit. 22, §§ 1223.1, 1225(B) (West 2011); Ore. Rev. Stat. § 133.545(5)-(6) (2011); Pa. Rules Crim. Proc. 203(A), (C) (2012); S.D. Codified Laws §§ 23A-35-4.2, 23A-35-5, 23A-35-6 (2004); Utah Rule Crim. Proc. 40(l) (2012); Vt. Rules Crim. Proc. 41(c)(4), (g)(2) (Supp.2012); Va. Code Ann. § 19.2-54 (Lexis Supp.2012); Wash. Super. Ct. Crim. Rule 2.3(c) (2002); Wis. Stat. § 968.12(3) (2007-2008); Wyo. Stat. Ann. § 31-6-102(d) (2011); see generally 2 W. LaFave, Search and Seizure § 4.3(b), pp. 511-516, and n. 29 (4th ed. 2004) (describing oral search warrants and collecting state laws).

For example, Arizona has achieved success in combating drunk driving through its pioneering use of electronic warrants, which can take fewer than fifteen minutes to process. Diana Hegyl, *iCISng eSearch Warrant Application*, Jud. Branch News 6 (Mar. 2013), perma.cc/BR6L-EB3S. In 2012 alone, Maricopa County Courts processed 10,510 electronic search warrants for the city of Phoenix. Although Arizona requires a warrant to compel a blood or breath BAC test (see *State* v. *Butler*, 302 P.3d 609, 613 (2013)) and does not have a criminal compelled-consent law, that State has a lower reported incidence of drunk driving than the national average. *Drunk Driving US Map*, Ctrs. for Disease Control & Prevention (Jan. 21, 2015), perma.cc/P5KM-J2ZZ. And since *McNeely*, States have continued to expand their use of electronic warrants, a trend we can expect to continue. See, *e.g.*, Fla. Stat. Ann. § 933.07 (West 2015) (allowing use of electronic warrants); *Notice to the Bar*, New Jersey Supreme Court (Nov. 14, 2013), perma.cc/B5BY-QF84 (authorizing the expanded use of electronic and remote "warrants for nonconsensual blood testing in all driving while intoxicated (DWI) cases where no indictable charge is anticipated").

It is notable, moreover, that police officers themselves support the reliance on warrants to obtain BAC tests. A study of DUI arrests in Arizona, Michigan, Oregon, and Utah, which all experimented with remote warrants, found that "[l]aw enforcement officers inter-

---

Missouri requires that search warrants be in writing and does not permit oral testimony, thus excluding telephonic warrants. Mo. Ann. Stat. §§ 542.276.2(1), 542.276.3 (West Supp.2012). State law does permit the submission of warrant applications 'by facsimile or other electronic means.' § 542.276.3." *McNeely*, 133 S. Ct. at 1562 n.4.

viewed in case study States generally supported the use of warrants" and "are willing to take the additional time that the warrant process requires in order to obtain BAC evidence." Nat'l Highway Traffic Safety Admin., *Use of Warrants for Breath Test Refusal: Case Studies*, Dep't of Transp. DOT HS 810 852 at vi-vii (2007), perma.cc/3XKN-YA2K. With simple instructions on how the warrant process works, "almost all drivers * * * cooperate, so that officers rarely need to use force." *Id.* at 11. See *McNeely*, 133 S. Ct. at 1567 (NHTSA study found that the use of warrants "can reduce breath-test-refusal rates and improve law enforcement's ability to recover BAC evidence") A follow-up study of "[t]hree counties in North Carolina [that] established the use of warrants in cases of breath test refusals" found that "police officers in these participating counties report that the 15 to 60 minutes of added processing time needed to obtain a warrant and draw blood was time well spent" because "time securing evidence saved time spent in court." Nat'l Highway Traffic Safety Admin., *Use of Warrants to Reduce Breath Test Refusals: Experiences from North Carolina*, Dep't of Transp. DOT HS 811 461 at i, 9 (2011), perma.cc/3XKN-YA2K.

Third, North Dakota underutilizes many alternative approaches that plainly comport with the Constitution and are more effective than compelled-consent laws in combating drunk driving. In its review of twenty-nine strategies for addressing impaired driving, the National Highway Traffic Safety Administration gave BAC test-refusal penalties a mediocre grade for effectiveness (three out of five stars). Nat'l Highway Traffic Safety Admin., *Countermeasures that Work: A Highway Safety Countermeasures Guide for State Highway Safety Offices*, Dep't of Transp., DOT HS 811 727 at 23-24 (7th ed. 2013), perma.cc/C5N3-LQJ6.

NHTSA found the following *nineteen* strategies to be *more*, or equally as, effective as compelled-consent requirements: (1) high-visibility sobriety checkpoints; (2) alcohol problem assessment and treatment; (3) alcohol interlocks; (4) alcohol screening and intervention; (5) minimum drinking-age laws; (6) high-visibility saturation patrols; (7) passive alcohol sensors; (8) DWI courts; (9) limits on diversion and plea agreements; (10) DWI offender monitoring; (11) lower BAC limits for repeat offenders; (12) open-container laws; (13) high-BAC sanctions; (14) integrated enforcement; (15) court monitoring; (16) mass-media campaigns; (17) zero-tolerance law enforcement for under-twenty-one drivers; (18) alcohol-vendor compliance checks; and (19) other laws to enforce the drinking age. *Ibid.*

North Dakota, however, has not made full use of all of these effective and constitutional strategies. For example, North Dakota could require the installation of alcohol ignition interlocks for convicted drunk drivers, to prevent them from driving when the device detects the presence of alcohol. "While installed, interlocks are effective in reducing recidivism by a median of 67 percent." Nat'l Highway Traffic Safety Admin., *Evaluation of State Ignition Interlock Programs: Interlock Use Analyses from 28 States*, 2006-2011, Dep't of Transp., DOT HS 812 145, at vi (2015), perma.cc/P6AG-4HUG. "[Twenty] states (and 4 California counties) have made ignition interlocks mandatory or highly incentivized for all convicted drunk drivers." *Drunk Driving Laws*, Governors Highway Safety Ass'n (Dec. 2015), perma.cc/2M39-CULF. Nevertheless, North Dakota does not mandate installation of alcohol ignition interlocks, even for repeat offenders. N.D. Code § 39-06.1-11.

Similarly, because "68 percent of drivers who had been drinking and were involved in fatal crashes had a blood alcohol content of .15 or greater," at least two dozen States deter particularly dangerous drunk driving by providing for enhanced penalties when drivers have BAC levels of 0.15% or higher. *Increased Penalties for High Blood Alcohol Content*, Nat'l Conference of State Legislators (Oct. 14, 2015), perma.cc/-2ZUD-TKS8. North Dakota's enhanced penalties, on the other hand, are applicable only at a BAC of 0.18% or higher. N.D. Code § 39-08-01.

With such a wide array of constitutional and effective strategies for combating drunk driving at its disposal, North Dakota does not need criminal compelled-consent laws to deter and prosecute drunk drivers. In saying this, we of course recognize that "'[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *McNeely*, 133 S. Ct. at 1565 (quoting *Michigan Dept. of State Police* v. *Sitz*, 496 U.S. 444, 451 (1990)). That, however, is why States have developed their extensive arsenal of constitutional approaches that can be used to address the problem—an arsenal that includes expedited warrant procedures, and that need not include criminal penalties for drivers who assert a fundamental constitutional right. As the Court has said in a closely analogous situation, the "answer to the question of what police must do before [requiring a test of a driver's blood, breath, or urine] is accordingly simple—get a warrant." *Riley*, 134 S. Ct. at 2495. That, and not the constitutionally dubious approach of criminalizing constitutionally protected conduct, is the proper answer here.

CONCLUSION

The decision of the North Dakota Supreme Court should be reversed.

Respectfully submitted.

DAN HERBEL
Herbel Law Firm
The Regency Business Ctr.
3333 East Broadway Ave., Suite 1205
Bismarck, ND 58501
(701) 323-0123

EUGENE R. FIDELL
Yale Law School
*Supreme Court Clinic**
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3147
crothfeld@mayerbrown.com

Counsel for Petitioner

FEBRUARY 2016

---

* The representation of petitioner by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

No. 14-1468

IN THE

Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF OF RESPONDENT

THOMAS R. MCCARTHY
WILLIAM S. CONSOVOY
J. MICHAEL CONNOLLY
BRYAN K. WEIR
CONSOVOY MCCARTHY PARK PLLC
GEORGE MASON UNIVERSITY
SCHOOL OF LAW SUPREME
COURT CLINIC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423

BRIAN DAVID GROSINGER
Counsel of Record
ASSISTANT STATE'S ATTORNEY
Morton County Courthouse
210 Second Avenue NW
Mandan, North Dakota 58554
(701) 667-3350
brian.grosinger@mortonnd.org

Counsel for Respondent

March 15, 2016

(Additional Counsel Listed on Inside Cover)

264642

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

PATRICK STRAWBRIDGE
CONSOVOY MCCARTHY PARK PLLC
GEORGE MASON UNIVERSITY SCHOOL
OF LAW SUPREME COURT CLINIC
10 Post Office Square
8th Floor South PMB, Suite 706
Boston, MA 02109
(617) 227-0548

MICHAEL PARK
CONSOVOY MCCARTHY PARK PLLC
GEORGE MASON UNIVERSITY SCHOOL
OF LAW SUPREME COURT CLINIC
3 Columbus Circle, 15th Floor
New York, NY 10019
(212) 247-8006

QUESTION PRESENTED

North Dakota law makes it a criminal offense for a motorist who has been arrested for driving under the influence to refuse to submit to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol. The Supreme Court of North Dakota held that the State may criminalize any refusal by a motorist to submit to such a test, even if a warrant has not been obtained. The question presented is:

Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS..... ii

TABLE OF CITED AUTHORITIES iv

STATEMENT.....1

A. Drunk Driving in the United States and in North Dakota 1

B. Brielle's Law 4

C. Proceedings Below 10

SUMMARY OF ARGUMENT.....14

ARGUMENT.....18

I. North Dakota's Implied-Consent Statute Is Constitutional 18

A. North Dakota's statutory scheme does not directly violate the Fourth Amendment or any other constitutional provision 19

B. North Dakota's implied-consent statute does not impose an unconstitutional condition on the use of public roads.....24

Table of Contents

Page

C. No other decision requires the Court to declare North Dakota's statutory scheme unconstitutional. 35

II. Invalidating North Dakota's Statutory Scheme Would Undermine The States' Ability To Protect The Public From Drunk Drivers. 39

A. Refusal laws are important tools in the battle against drunk driving. 39

B. Upholding North Dakota law is consistent with the Court's broader approach to the unconstitutional-conditions doctrine. 48

C. North Dakota's implied-consent penalties do not vitiate the expectation of privacy protected by the Fourth Amendment. 54

CONCLUSION 56

TABLE OF CITED AUTHORITIES

Page

CASES

Bell v. Wolfish,
441 U.S. 520 (1979) 30, 37

Branti v. Frankel,
445 U.S. 507 (1980) 50, 51

Breithaupt v. Abram,
352 U.S. 432 (1957) 1, 21, 22, 28

Buck v. Kuykendall,
267 U.S. 307 (1925) 32

Camara v. Municipal Court of City and Cty. of San Francisco,
387 U.S. 523 (1967) 36, 37, 38, 39

Chandler v. Miller,
520 U.S. 305 (1997) 36

City of Los Angeles v. Patel,
135 S. Ct. 2443 (2015) ..... *passim*

City of Mandan v. Leno,
618 N.W.2d 161 (N.D. 2000) 8

Connick v. Myers,
461 U.S. 138 (1983) 25, 50

Dixon v. Love,
431 U.S. 105 (1977) 27

Cited Authorities

Page

Dolan v. City of Tigard,
512 U.S. 374 (1994) 51, 53

Ferguson v. City of Charleston,
532 U.S. 67 (2001) 38

Fletcher v. Peck,
10 U.S. (6 Cranch) 87 (1810) 19

Frost & Frost Trucking Co. v. Railroad Comm'n,
271 U.S. 583 (1926) 53

Garcetti v. Ceballos,
547 U.S. 410 (2006) 50

Greenlaw v. United States,
554 U.S. 237 (2008) 37

Grove City Coll. v. Bell,
465 U.S. 555 (1984) 25, 49, 53

Illinois v. Batchelder,
463 U.S. 1112 (1983) 23

John Doe No. 1 v. Reed,
561 U.S. 186 (2010) 40

Kane v. New Jersey,
242 U.S. 160 (1916) 32

Cited Authorities

Page

Koontz v. St. Johns River Water Mgmt. Dist.,
133 S. Ct. 2586 (2013).....51

Lyng v. Automobile Workers,
485 U.S. 360 (1988).....25

Mackey v. Montrym,
443 U.S. 1 (1979)..... *passim*

Maryland v. King,
133 S. Ct. 1958 (2013).....30

Michigan Dep't of State Police v. Sitz,
496 U.S. 444 (1990).....1, 28

Missouri v. McNeely,
133 S. Ct. 1552 (2013)..... *passim*

National Federation of Independent Businesses v. Sebelius,
132 S. Ct. 2566 (2012).....52

National Treasury Employees Union v. Von Raab,
489 U.S. 656 (1989).....38

Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987).....52

Nyflot v. Comm'r of Pub. Safety,
369 N.W.2d 512 (Minn. 1985) 45

Page

Potratz v. N. Dakota Dep't of Transp.,
843 N.W.2d 305 (N.D. 2014) 8

Rust v. Sullivan,
500 U.S. 173 (1991) 49

Rutan v. Republican Party of Illinois,
497 U.S. 62 (1990) 49-50

Schmerber v. California,
384 U.S. 86 (1986) 23, 32

Schneckloth v. Bustamonte,
412 U.S. 218 (1973) 35, 36

Skinner v. Ry. Labor Executives' Ass'n,
489 U.S. 602 (1989) ..... *passim*

Snepp v. United States,
444 U.S. 507 (1980) 25

South Dakota v. Dole,
483 U.S. 203 (1987) 52, 53

South Dakota v. Neville,
459 U.S. 553 (1983) ..... *passim*

State v. Birchfield,
Crim. No. 30-2013-CR-00720
(Morton Cnty. Dist. Ct. Jan. 27, 2014) 12

Cited Authorities

Page

State v. Kouba,
319 N.W.2d 161 (N.D. 1982) 32

State v. Murphy,
516 N.W.2d 285 (N.D. 1994) 4, 45

State v. Zimmerman,
539 N.W.2d 49 (N.D. 1995) 2, 3

Stephenson v. Binford,
287 U.S. 251 (1932) 53

Tennessee v. Garner,
471 U.S. 1 (1985) 40

Timm v. State,
110 N.W.2d 359 (N.D. 1961) 3, 4

U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers,
413 U.S. 548 (1973) 25

United Pub. Workers of Am. v. Mitchell,
330 U.S. 75 (1947) 25

United States v. Horn,
185 F. Supp. 2d 530 (D. Md. 2002) 11

United States v. Jones,
132 S. Ct. 945 (2012) 20

Cited Authorities

Page

Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008) 19

Wyman v. James, 400 U.S. 309 (1971) 20, 21

Yellowbird v. N.D. Dep't of Transp., 833 N.W.2d 536 (N.D. 2013) 8

Zap v. United States, 328 U.S. 624 (1946) 25

STATUTES AND OTHER AUTHORITIES

23 U.S.C. § 163(a) 42

42 U.S.C. § 300a-6 49

23 C.F.R. § 1225.1 42

36 C.F.R. § 4.23(c)(2) 44

N.D. Cent. Code § 39-08-01(1)(a) 11, 42

N.D. Cent. Code § 39-08-01(1)(a)-(d) 3

N.D. Cent. Code § 39-08-01(1)(e) 12

N.D. Cent. Code § 39-08-01(1)(e)(2) 8

Cited Authorities

Page

N.D. Cent. Code § 39-08-01(1)(e)(3) 8, 11

N.D. Cent. Code § 39-08-01(3) 9, 11

N.D. Cent. Code § 39-08-01(5)(a)(2). 9, 42, 47, 55

N.D. Cent. Code § 39-08-01(5)(a)-(i) 9

N.D. Cent. Code § 39-20-01 . . . . . .3, 4, 8, 39-40

N.D. Cent. Code § 39-20-01(2) 8, 54

N.D. Cent. Code § 39-20-01(3) 11

N.D. Cent. Code § 39-20-01(3)(a) 9

N.D. Cent. Code § 39-20-02 9

N.D. Cent. Code § 39-20-04(1) 9

N.D. Cent. Code § 39-20-07 8

N.D. Cent. Code § 39-20-14(3) 8

N.D. Cent. Code § 54-12-27 5

N.D. Cent. Code § 54-12-28 5

N.D. Cent. Code § 54-12-31 5

Cited Authorities

Page

NCUTLO DWI Model Code § 102(a) 44

Centers for Disease Control & Prevention, Drunk Driving Death Rates by State 2012 1

Centers for Disease Control & Prevention, Sobering Facts: Drunk Driving in North Dakota 1 (Dec. 2014).....1

John Hoffman, *Implied Consent with a Twist: Adding Blood to New Jersey's Implied Consent Law and Criminalizing Refusal Where Drinking and Driving Results in Death or Serious Injury*, 35 Rutgers L.J. 345 (2003) 2

Larry Forman, *Why You Should Always Refuse the Breathalyzer and the Standardized Field Sobriety Tests*, Larry Forman Law Blog (May 11, 2014).....43

National Institute on Alcohol Abuse and Alcoholism, Alcohol Overdose: The Dangers of Drinking Too Much (Oct. 2015) 11

New Details on a Fatal Accident That Killed 4 People, WDAY News (July 26, 2012).....4

Page

NHTSA, Alcohol & Highway Safety: A Review of the State of Knowledge 174 (No. 811374, Mar. 2011) 42

NHTSA, Breath Test Refusal Rates in the United States–2011 Update 1 (No. 811881, Mar. 2014),.....42

NHTSA, Breath Test Refusals and Their Effect on DWI Prosecutions 45-46 (No. 811551, July 2012) 45

NHTSA, Countermeasures That Work: A Highway Safety Countermeasure Guide for State Highway Safety Offices, 1-7 (No. 811727, April 2013).....44, 46

NHTSA, Digest of Impaired Driving and Selected Beverage Control Laws (No. 812119, Feb. 2015) 2

NHTSA, Extent of Driving While Suspended for DWI (No. 278, July 2003) 43

NHTSA, Traffic Safety Facts, 2014 Data 2 (No. 812231, Dec. 2015) 1

NHTSA, Traffic Safety Facts, 2014 Crash Data Key Findings 1 (No. 812219, Nov. 2015) 40

Cited Authorities

Page

Nick Smith, *Two Grieving Families Push for Stronger DUI Laws*, Bismarck Trib. (Feb. 1, 2013).....5

North Dakota Dep't of Transp., *2014 North Dakota Crash Summary 35* (2014) 10

North Dakota Dep't of Transp., *North Dakota Traffic Fatalities Lowest in Five Years* 1 (Jan. 7, 2016).....10

On a Mission for the Boys: Parents Lobby Legislature for Tougher DUI Laws, Grand Forks Herald (Jan. 15, 2013).....5

Robert B. Voas, *et al.*, *Implied-consent laws: A review of the literature and examination of current problems and related statutes*, 40 J. of Safety Research 77 (2009).....41

Robyn D. Robertson and Herb M. Simpson, *DWI System Improvement for Dealing with Hard Core Drinking Drivers*, Traffic Injury Research Foundation (June 2002).....41, 43, 44

Tina Wescott Cafaro, *Fixing the Fatal Flaws in OUI Implied Consent Laws*, 34 J. Legis. 99 (2008)..... 42, 44

STATEMENT

A. Drunk Driving in the United States and in North Dakota

"No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990). Indeed, "this Court has 'repeatedly lamented the tragedy.'" *Id.* (quoting *South Dakota v. Neville*, 459 U.S. 553, 558 (1983)). "'The increasing slaughter on our highways ... reaches the astounding figures only heard of on the battlefield.'" *Id.* (quoting *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957)).

Between 2005 and 2014, 112,998 people were killed in alcohol-impaired-driving crashes in the United States. National Highway Traffic Safety Administration ("NHTSA"), Traffic Safety Facts, 2014 Data 2 (No. 812231, Dec. 2015), http://goo.gl/ktKi4t. In 2014 alone, 9,967 people were killed in such crashes; that amounts to roughly one death every 53 minutes. *Id.* at 1.

North Dakota has suffered more than its share of this carnage. On a per-population basis, North Dakota had the highest drunk-driving death rate in the United States in 2012, with 11.3 deaths per 100,000 people. Centers for Disease Control & Prevention, Drunk Driving Death Rates by State 2012, http://goo.gl/KsHtIZ. That was more than three times the national average. Centers for Disease Control & Prevention, Sobering Facts: Drunk Driving in North Dakota 1 (Dec. 2014), http://goo.gl/Qt9Nzz.

Efforts to combat drunk driving in the United States date back nearly a century, to the beginning of the mass-production of automobiles. But early laws criminalizing drunk driving were difficult to enforce because of the evidentiary problem of proving that drivers were "grossly intoxicated." John Hoffman, *Implied Consent with a Twist: Adding Blood to New Jersey's Implied Consent Law and Criminalizing Refusal Where Drinking and Driving Results in Death or Serious Injury*, 35 Rutgers L.J. 345, 347 (2003). States responded by passing drunk driving laws that permitted the use of blood alcohol concentration ("BAC") as evidence of intoxication. *Id.* at 348. In the 1960s, States adopted the first *per se* drunk driving laws. *Id.* at 348-49. Under these laws, prosecutors no longer had to prove actual impairment; a BAC above a certain level (typically 0.15%) was generally sufficient to secure a conviction. *Id.* at 349.

Efforts to curb drunk driving continued through the ensuing decades. The federal government eventually tied highway funding to States enacting 0.08% BAC *per se* laws. *Id.* at 348-49 & n.29. By 2005, the fifty States, the District of Columbia, and Puerto Rico all had enacted 0.08% BAC *per se* drunk driving laws. NHTSA, Digest of Impaired Driving and Selected Beverage Control Laws v (No. 812119, Feb. 2015), http://goo.gl/dMlNHp.

North Dakota, like most States, has spent much of the automotive era combatting drunk driving. Since 1923, North Dakota has criminalized the operation of motor vehicles while intoxicated. 1923 N.D. Laws 359-60; *State v. Zimmerman*, 539 N.W.2d 49, 51 (N.D. 1995). Under current law, North Dakota outlaws driving on public roads under the influence of alcohol, drugs, or other substances.

Specifically, a person may not drive a vehicle on public roads if he: (1) "has an alcohol concentration of at least [0.08%] at the time of the performance of a chemical test within two hours after the driving or being in actual physical control of a vehicle"; (2) is "under the influence of intoxicating liquor"; (3) is "under the influence of any drug or substance or combination of drugs or substances to a degree which renders that person incapable of safely driving"; or (4) is "under the combined influence of alcohol and any other drugs or substances to a degree which renders that person incapable of safe driving." N.D. Cent. Code § 39-08-01(1)(a)-(d).

To aid these efforts, North Dakota has long imposed penalties on suspected drunken drivers who refuse to submit to chemical tests to determine the presence of alcohol, drugs, or other substances in their bodies. 1959 N.D. Laws 475-79; *Zimmerman*, 539 N.W.2d at 51. In the Implied Consent Act of 1959, North Dakota provided that "[a]ny person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent subject to the provisions of this chapter to a chemical test, or tests, of his blood, breath, saliva, or urine for the purpose of determining the alcoholic content of his blood." N.D. Cent. Code § 39-20-01 (1960); *Timm v. State*, 110 N.W.2d 359, 362 (N.D. 1961). An officer could administer this test "only after placing such person ... under arrest and informing him that he is and will be charged with the offense of driving ... upon the public highways while under the influence of intoxicating liquor." N.D. Cent. Code § 39-20-01 (1960).

Instead of permitting officers to forcibly administer a test over the arrestee's objection, North Dakota elected

to penalize the refusal to submit to chemical testing. *Id.* § 39-20-04 (1960). First, the State would revoke, for a period of six months, the individual's driver's license. *Id.* Second, the State could use the individual's refusal as evidence in a criminal prosecution. *Id.* § 39-20-08 (1960). North Dakota courts have upheld these penalties as valid exercises of the State's police power. *State v. Murphy*, 516 N.W.2d 285, 287 (N.D. 1994); *Timm*, 110 N.W.2d at 362-63. This Court also has upheld laws of this kind. *Neville*, 459 U.S. 553; *Mackey v. Montrym*, 443 U.S. 1 (1979). North Dakota's implied consent law continues in this same basic form today. N.D. Cent. Code § 39-20-01, *et seq.*

B. Brielle's Law

On July 6, 2012, Aaron and Allison Deutscher were driving with their eighteen-month old daughter, Brielle, to Bismarck, North Dakota to attend a family reunion. Allison was pregnant with her second child. Driving toward them was Wyatt Klein. That day, Klein had visited two bars and consumed seven or eight beers and three shots of tequila. Before leaving the second bar, Klein purchased two beers to take home with him. Klein drove his truck the wrong way on the highway and struck the Deutschers' car head-on. Aaron, Allison, and Brielle were all killed instantly. Klein also was killed. His BAC was 0.25%—more than three times the legal limit. Legislative History of HB1302 at 332-33, http://goo.gl/JL8OHu ("HB1302 History"); *New Details on a Fatal Accident That Killed 4 People*, WDAY News (July 26, 2012), http://goo.gl/rw2MQS. Klein had a history of drunk driving violations. HB1302 History at 332.

The next day, July 7, 2012, Juan Ruiz took his five- and nine-year-old sons, Alaries and Cyris, to Lake Metigoshe in North Dakota. They spent the day swimming and boating. That night, the boys pitched a tent and stayed up late telling stories. Finally, their father told them it was time for bed because they planned to wake up early the next morning to go fishing. A few hours later, around 1:00 am, Juan Acosta was driving his truck through the campground. Acosta had been drinking and smoking marijuana that day. He lost control of the truck and careened into the tent, running over Alaries and Cyris who were inside. Juan Ruiz awoke and tried to free his sons from beneath the truck, to no avail. Alaries and Cyris died on the scene. Juan Ruiz suffered a collapsed lung, broken ribs, and other internal injuries. Acosta survived. His BAC was 0.17%—more than twice the legal limit. HB1302 History at 338-40; *On a Mission for the Boys: Parents Lobby Legislature for Tougher DUI Laws*, Grand Forks Herald (Jan. 15, 2013), http://goo.gl/Bb2Ct6.

These tragic deaths galvanized the State to address its drunk-driving epidemic. *See, e.g.*, Nick Smith, *Two Grieving Families Push for Stronger DUI Laws*, Bismarck Trib. (Feb. 1, 2013), http://goo.gl/WfhAUT. Legislators proposed a law known as "Brielle's law," after Brielle Deutscher, that would, among other things, increase penalties for driving under the influence, encourage participation in the State's 24/7 Sobriety Program,[1] and make a refusal to submit to a chemical test a criminal

1. The 24/7 Sobriety Program allows individuals who commit alcohol-related offenses to avoid incarceration by, among other things, agreeing to refrain from using alcohol and submitting to daily sobriety testing. N.D. Cent. Code §§ 54-12-27, 54-12-28, 54-12-31.

violation. Members of families affected by drunk driving testified in support of the legislation, as did many others. *See, e.g.*, HB1302 History at 7-9, 63, 296, 332-33, 338-40, 399-403, 501.

During the committee hearings, State legislators studied the crisis of drunk driving in North Dakota. North Dakota's rates of alcohol-related fatalities and adult and underage binge drinking were among the highest in the nation. *Id.* at 315, 325. According to its Attorney General, in 2011, North Dakota had 6,600 arrests for driving under the influence, approximately one out of every 100 people in the State. *Id.* at 2-3. Repeat offenders committed roughly one-third of those 6,600 violations. *Id.* In 2010, more than half of all crashes resulting in deaths were alcohol-related, which was almost twice the national average. *Id.* at 313, 315, 336. In 2011, one alcohol-related crash occurred every 8.6 hours, and one alcohol-related fatality occurred every 5.5 days. *Id.* at 315. Moreover, high levels of intoxication were common. The average recorded BAC (as measured by blood tests) was over twice the legal limit, and the average BAC for drivers involved in a fatal crash was even higher. *Id.* at 315. Drug-impaired driving also was becoming "an ever-increasing problem in the state." *Id.* at 390.

Over and over, witnesses and legislators testified about the need for a "cultural change" regarding drunk driving. As one police officer explained, "[i]n high school during the 1970s drinking and driving was our pastime. To be arrested for driving under the influence was almost viewed as a passage to manhood.... We can no longer view driving drunk as just another traffic violation." *Id.* at 319; *id.* at 296 ("Tragedies, such as the one which took the young lives of the Deutscher family from West Fargo,

make it clear that we have a problem with the culture of drinking and driving in our state."). Many believed that tougher laws and increased access to educational programs would help. As the State Attorney General explained, "there [are] a number of people who think[] that everybody is entitled to one DUI and then we should get tough on them. We are at the light end nationally for penalties.... The lesson we learn from other states with tougher laws is that [they do] have an effect." *Id.* at 3-4; *id.* at 7 ("[T]here is no deterrent with the current law.").

Legislators were particularly concerned with the numbers of impaired drivers who escaped punishment by refusing chemical tests for alcohol and drugs. In 2011, 18.8% of those arrested for driving under the influence (1,169 people) refused to take a chemical test. *Id.* at 298. They were "very difficult to prosecute criminally" because the State lacked concrete evidence to convict them. *Id.* at 156. In addition, the primary administrative punishment available—*i.e.*, revoking a driver's license—often had little deterrent effect because offenders would simply continue to drive without a license. *Id.* at 3, 62.

Lawmakers ultimately determined that imposing criminal penalties would further deter refusal of chemical tests by foreclosing the ability of impaired drivers to escape punishment. Legislators also viewed this as a safer route than the only alternative: forced testing over the objection of the arrestee, which would require police officers to "physically hold [a person] down." *Id.* at 3. They feared that this would lead to aggressive confrontations and endanger officers, "especially [those] in rural [North Dakota] where there may be only one officer." *Id.* at 3.

Under the revised law, use of North Dakota's public roads is still conditioned on the driver's agreement to submit to "a chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-20-01." N.D. Cent. Code § 39-08-01(1)(e)(2).[2] And the results of such a test are still admissible as evidence to prove the driver was intoxicated. *City of Mandan v. Leno*, 618 N.W.2d 161, 164 (N.D. 2000) (citing N.D. Cent. Code § 39-20-07).

Under Section 39-20-01, a police officer can require a chemical test only if he first places the individual under arrest and informs him that he is being or will be charged with driving under the influence. N.D. Cent. Code § 39-20-01(2). The officer also must inform the individual that "North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs; that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence; and that refusal of the individual to submit to the test directed by

---

2. An onsite screening test of an individual's breath is a different type of test; its results are not admissible as evidence. An onsite test is used only "for the purpose of estimating the alcohol concentration in the individual's breath," N.D. Cent. Code § 39-08-01(1)(e)(3), so that the officer can determine "whether or not a further test shall be given under the provisions of section 39-20-01," *id.* § 39-20-14(3), and whether "there are reasonable grounds to arrest the individual," *Yellowbird v. N.D. Dep't of Transp.*, 833 N.W.2d 536, 539 (N.D. 2013) (citation omitted). And it is administered through the use of a different device. *Potratz v. N. Dakota Dep't of Transp.*, 843 N.W.2d 305, 307 (N.D. 2014).

the law enforcement officer may result in a revocation ... of the individual's driving privileges." N.D. Cent. Code § 39-20-01(3)(a).[3] "If a person refuses to submit to testing under section 39-20-01 ..., none may be given." N.D. Cent. Code § 39-20-04(1).

By refusing the test, however, the individual commits a class B misdemeanor for the first or second offense in a seven-year period, a class A misdemeanor for a third offense in a seven-year period, and a class C felony for any fourth or subsequent offense within a fifteen-year period. N.D. Cent. Code § 39-08-01(3). Available penalties include fines, imprisonment, addiction evaluation by a licensed addiction treatment program, and participation in the State's 24/7 Sobriety Program. N.D. Cent. Code § 39-08-01(5)(a)-(i). In addition, the individual's driver's license shall be revoked for a period ranging from 180 days to three years. N.D. Cent. Code § 39-20-04(1). In some cases, these penalties mirror those for driving under the influence. But an arrestee who records a BAC of 0.16% or higher will face tougher fines and penalties (potentially including mandatory imprisonment) than an individual who refuses a chemical test. N.D. Cent. Code § 39-08-01(5)(a)(2).

On April 26, 2013, the legislature passed Brielle's law. Three days later, Governor Jack Dalrymple signed the bill into law. Since then, North Dakota has experienced a significant decrease in drunk-driving fatalities. In 2012, the year before Brielle's law was enacted, 51% of crashes

---

3. "Only an individual medically qualified to draw blood, acting at the request of a law enforcement officer, may withdraw blood for the purpose of determining the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood." N.D. Cent. Code § 39-20-02.

resulted in alcohol-related fatalities. North Dakota Dep't of Transp., *2014 North Dakota Crash Summary* 35 (2014), https://goo.gl/L8PxCv. Three years later, only 41% of crashes resulting in fatalities were alcohol-related—the lowest rate in more than a decade. North Dakota Dep't of Transp., *North Dakota Traffic Fatalities Lowest in Five Years* 1 (Jan. 7, 2016), https://goo.gl/HP3zxj. During the same period, the number of deaths from alcohol-related crashes dropped by 38 percent. *2014 North Dakota Crash Summary, supra,* at 35; *North Dakota Traffic Fatalities Lowest in Five Years, supra,* at 1.

C. Proceedings Below

On October 10, 2013, Petitioner Danny Ray Birchfield drove his car into a ditch off of a highway in Morton County, North Dakota. State Trooper Tarek Chase arrived on the scene and observed Birchfield attempting to drive out of the ditch. As the officer approached Birchfield, he smelled a strong odor of alcohol and saw that his eyes were bloodshot and watery. When the officer spoke with him, he noticed that Birchfield's speech was slurred. When Birchfield stepped out of the car, the officer noticed that he was unsteady on his feet. Based on these observations, he suspected Birchfield of being intoxicated. Opposition to Motion to Dismiss ("Opp.") (Doc. 28) at 1-2.

Trooper Chase asked Birchfield if he would submit to field sobriety testing; Birchfield agreed. The officer conducted four field sobriety tests. First, he conducted the Horizontal Gaze Nystagmus ("HGN") test, which requires the officer to shine a light in front of the suspect and watch his eye movement for involuntary twitching. Birchfield failed this test, showing all six indicia of impairment.[4]

4. Under the HGN test, the officer is trained to look for six

Second, the officer conducted the alphabet test, which requires the suspect to recite sections of the alphabet in order. Birchfield performed poorly, pausing numerous times. Third, the officer conducted the backwards-counting test, which requires the suspect to count backwards from one number to another. Birchfield again performed poorly, pausing numerous times and failing to stop when requested. Fourth, the officer conducted the finger count test, which requires the subject to touch the tips of his fingers to the tip of his thumb, counting as he proceeds. Birchfield performed poorly yet again, displaying poor finger dexterity and improper finger count. Opp. 1.

After administering these four tests, Trooper Chase believed that Birchfield was intoxicated and thus read Birchfield the implied consent advisory as required by State law. Opp. 1-2; N.D. Cent. Code § 39-08-01(1)(e)(3), § 39-20-01(3). The officer requested an onsite screening test of his breath, and Birchfield agreed. The breath test indicated that his BAC was 0.254%, which is more than three times the legal limit.[5] Opp. 1-2; N.D. Cent. Code § 39-08-01(1)(a).

"clues" of impairment. If the officer observes four or more clues, it is likely that the suspect's BAC is above 0.10%. *United States v. Horn*, 185 F. Supp. 2d 530, 537 (D. Md. 2002).

5. At this BAC, Birchfield's speech, memory, coordination, attention, reaction time, and balance would have been "significantly impaired." National Institute on Alcohol Abuse and Alcoholism, *Alcohol Overdose: The Dangers of Drinking Too Much* (Oct. 2015), http://goo.gl/hSyS46. Birchfield also would have been at risk for blackouts, vomiting, and loss of consciousness. *Id.* Therefore, his "driving-related skills, judgment, and decisionmaking" would have been "dangerously impaired." *Id.*

After Birchfield failed the onsite test, Trooper Chase arrested him for driving under the influence. The officer read him his *Miranda* rights and the implied consent advisory a second time. The officer then asked Birchfield to take a chemical test of his blood. Birchfield refused. He was charged with driving under the influence of alcohol or drugs and/or refusing to submit to a chemical test after request by a law enforcement officer. Because this was Birchfield's second alcohol-related offense within seven years, *State v. Birchfield*, Crim. No. 30-2013-CR-00720 (Morton Cnty. Dist. Ct. Jan. 27, 2014) (Doc. 26) (pleading guilty to driving under the influence under N.D. Cent. Code 39-08-01), the charge was listed as a class B misdemeanor. Birchfield also was charged with driving with a suspended license (alcohol-related) and driving without liability insurance. Opp. 1-2.[6]

Birchfield moved to dismiss the refusal charge, asking the district court to find N.D. Cent. Code § 39-08-01(1)(e) unconstitutional under the Fourth Amendment and the North Dakota Constitution. The district court denied the motion, concluding that Birchfield's Fourth Amendment rights were not violated. Because Birchfield refused the test, "the requested search, the blood draw, was not conducted." Petition Appendix ("Pet. App.") 26a. Accordingly, "[t]here was no search so there was no Fourth Amendment violation." *Id.* North Dakota, the court explained, had long imposed administrative penalties for

---

6. Because this was Birchfield's second alcohol-related offense, he was placed in the State's 24/7 Sobriety Program, which required him to refrain from using alcohol while on probation. *See supra* 5 n.1. On March 10, 2014, a warrant was issued for Birchfield's arrest because he had three alcohol consumption events since his last arrest. Bench Warrant (Doc. 45).

refusing a chemical test and allowed such a refusal to be used as evidence in a criminal prosecution. *Id.* Making such a refusal "a separate crime and not merely evidence to prove the crime of a DUI" did not render the law unconstitutional. Pet. App. 26a.

The Supreme Court of North Dakota affirmed. The court explained that "[d]riving is a privilege, not a constitutional right and is subject to reasonable control by the State under its police power." Pet. App. 3a-4a. The court held that North Dakota, like many other States, had made a reasonable decision to impose penalties on those who refused to consent to a chemical test when probable cause existed to believe they had been driving while intoxicated. Pet. App. 5a-7a.

In its view, this Court's decision in *Missouri v. McNeely*, which held only that "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant," 133 S. Ct. 1552, 1568 (2013), did not alter the analysis, Pet. App. 8a-9a. *McNeely* had recognized that "all 50 States have adopted implied consent laws" that "impose significant consequences when a motorist withdraws consent," including suspending the driver's license and allowing the refusal to be used as evidence in a subsequent criminal prosecution. Pet. App. 8a (quoting *McNeely*, 133 S. Ct. at 1566). The court did not understand *McNeely* to suggest that taking the additional step of criminalizing the refusal violated the Fourth Amendment. Pet. 8a-9a. Indeed, multiple state and federal courts had rejected such arguments. Pet. App. 9a-10a (listing cases). The other cases upon which Birchfield relied were distinguishable

because they were not "decided in the context of drunk-driving prosecutions where an officer had probable cause to search a defendant's body." Pet. App. 14a.

The court added that the "touchstone of the Fourth Amendment is reasonableness" and important government interests outweighed the minor intrusions on privacy. Pet. App. 14a-15a. "A licensed driver has a diminished expectation of privacy with respect to enforcement of drunk-driving laws because he or she is presumed to know the laws governing the operation of a motor vehicle, and the implied consent laws contain safeguards to prohibit suspicionless requests by law enforcement officers to submit to a chemical test." Pet. App. 15a. "The Legislature created a statutory right to refuse a chemical test, but has attached significant consequences to refusal so a driver may not avoid the potential consequences of test submission and gain an advantage by simply refusing the test." *Id.* Such a law "reduces the likelihood that drunk drivers will avoid a criminal penalty by refusing to take a test, and, therefore, it is reasonable because it is an efficient tool in discouraging drunk driving." Pet. App. 16a (citation omitted).

SUMMARY OF ARGUMENT

North Dakota's statutory scheme, like myriad laws throughout the country, employs an "implied consent" model. In return for access to North Dakota's public roads, drivers consent to taking a chemical test upon arrest for drunk driving. The arrestee may revoke his consent; in so doing, he will avoid a nonconsensual warrantless search. Revoking consent does, however, subject the individual to civil and criminal penalties. The law is constitutional.

The statutory condition does not violate the Fourth Amendment. By definition, the Fourth Amendment is not implicated unless there is a search. Birchfield was never searched. Nor does the statute directly violate any other constitutional provision. The Court has repeatedly upheld implied consent statutes of this kind against various due process challenges. The Court has rejected Fifth Amendment challenges as well. Together, these cases hold—as *McNeely* reiterated—it is constitutional to penalize revocation of consent to take a chemical test under these circumstances by suspending the driver's license and/or using the fact of the refusal as evidence against him in a criminal proceeding. Notably, Birchfield does not argue otherwise.

Instead, as the question presented indicates, Birchfield's argument is that it violates the unconstitutional-conditions doctrine to "make it a crime" to revoke consent. The Court should reject that argument for several reasons. As an initial matter, Birchfield was convicted of a misdemeanor equal to the least serious charge for driving under the influence of alcohol or drugs. If *that* penalty does not cross a constitutional line, his facial attack on North Dakota law cannot succeed. Moreover, Birchfield cannot prevail by contending, as he does, that all conditions on constitutional rights are always unlawful (or at least always unlawful in the Fourth Amendment context). Myriad decisions reject the former proposition, and the Court's decisions upholding civil penalties for revoking consent necessarily reject the latter. In all manner of constitutional settings, the Court has closely reviewed the government condition, upholding some and invalidating others.

In these cases, the Court weighs: (1) the importance of the government interest; (2) the constitutional right the individual must forgo and the degree of interference with that right; and (3) the nature of the condition. Here, the balance tips in favor of upholding the law. Foremost, North Dakota has a compelling interest in combating drunk driving. This statute substantially advances that interest in multiple ways. The statute deters drunk driving, encourages arrestees to take the chemical test, and avoids physical confrontations between the police and inebriated suspects. Stated differently, the statistical evidence confirms that absent the ability to punish revocation of consent, there will be more drunk-driving fatalities, it will be more difficult to secure drunk-driving convictions, and the police will feel compelled to use force to secure the evidence needed to obtain a conviction for drunk driving.

Those government interests far outweigh the limited interference with an arrestee's right to require the police to secure a warrant before conducting the search. The right to demand that police secure a warrant here is at the periphery of the Fourth Amendment. This is not a situation in which police will have difficulty doing so. In *McNeely*, the Court divided over if and when a warrant would be needed or when exigent circumstances would obviate the warrant requirement. But no Member of the Court doubted that probable cause to conduct a BAC test would exist virtually every time an individual is arrested for drunk driving. There certainly was probable cause in this case. Hence, this is not a situation where, but for the statutory condition, no search is likely to occur. Further, interference with that right is minimal. The chemical test is a search. But this Court has repeatedly held that

it is minimally invasive. In sum, this condition bears no resemblance to the suspicionless, warrantless, searches of an individual's home or business to which Birchfield compares it.

Moreover, it is settled law that driving on public roads is a privilege. Birchfield claims that, in today's world, driving is important. And that is a fair point. But it only undermines his argument given his concession that an individual's driver's license may be suspended for revoking consent to take a chemical BAC test. Birchfield offers little argument as to why making revocation of consent a misdemeanor is decisive. Simply asserting that it should be "obvious" without explanation suggests that he has no answer. Indeed, for all the reasons set forth above, charging Birchfield with a misdemeanor for revoking his consent was entirely reasonable.

Birchfield's arguments as to why precedent requires invalidation of North Dakota law all miss the mark. He argues that implying consent is incompatible with the Fourth Amendment's "totality of circumstances" test for voluntariness. But that test is used when there has been a search—it is not a substitute for an unconstitutional-conditions analysis. Birchfield's reliance on other Fourth Amendment theories, such as the "special needs" and "administrative" search cases, is similarly misplaced. Those decisions provide an exception to the warrant and probable cause requirements for certain types of searches. No search occurred here, so no exception is needed.

Birchfield's fundamental point is that the failure to rely on consent in those cases is an indication that the argument cannot prevail here. But both his premise and

his conclusion are wrong. The Court did not reach the issue in those cases because no party raised it. No party raised it because those requirements were not conditioned on receipt of a benefit or privilege. And, had they been, the case for upholding the condition would have been far weaker than it is here.

In the end, the Court has always taken a practical approach to issues of this sort. That is the clear lesson of the Court's free speech, takings, and government spending decisions. It is not now—nor has it ever been—an all-or-nothing proposition. The fundamental question is whether the condition is reasonable given the government's practical need to impose it. It is difficult to overstate the importance of this condition. The States have been waging a battle against drunk driving for nearly a century. Over that time, this Court has consistently validated the use of implied consent laws as an important weapon in that fight. This was not an effort to circumvent *McNeely* or any other decision. Through experience, the States learned that making it a crime (almost always a misdemeanor) to refuse a chemical test upon a drunk-driving arrest saves lives. The judgment of the Supreme Court of North Dakota should be affirmed.

ARGUMENT

I. North Dakota's Implied-Consent Statute Is Constitutional.

Birchfield brings a facial challenge to North Dakota's implied-consent statute. To prevail, he faces a high bar. First, whether a State has exercised its police power in a manner that conflicts with the Constitution "is, at all

times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810). Second, because this is a facial challenge, Birchfield must establish that the North Dakota "law is unconstitutional in all of its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). He cannot carry this burden.

North Dakota did not directly violate the Fourth Amendment. If Birchfield does not consent to a chemical test at the time of his arrest, he will not be subject to a nonconsensual warrantless search. Moreover, courts have upheld implied-consent laws similar to this one against due process and Fifth Amendment challenges. Nor does the law violate the unconstitutional-conditions doctrine. This Court has previously upheld—and recently endorsed—laws that penalize drunk-driving arrestees who revoke their consent to take a chemical test by suspending their driver's license and using the refusal as evidence against them to secure a criminal conviction. North Dakota's decision also to make Birchfield's revocation of consent a misdemeanor is not unconstitutional.

A. North Dakota's statutory scheme does not directly violate the Fourth Amendment or any other constitutional provision.

Birchfield argues at length that a chemical test is a search under the Fourth Amendment and, accordingly, may not be taken without a warrant unless an exception to that requirement applies. Brief for Petitioner ("Br.") 12-20. Birchfield is right, but his point is irrelevant. "The Fourth Amendment protects '[t]he right of the people to

be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451-52 (2015) (quoting U.S. Const. amend. IV). A Fourth Amendment issue thus arises only if there is a "search" or "seizure." *United States v. Jones*, 132 S. Ct. 945, 949 (2012).

No search occurred. The arresting officers sought Birchfield's consent to perform the chemical test. When he refused, no chemical test was conducted. *See supra* 12. As a result, Birchfield's lengthy Fourth Amendment argument is irrelevant.

The Court's ruling in *Wyman v. James*, 400 U.S. 309 (1971), illustrates the point. There, beneficiaries of New York's Aid to Families with Dependent Children program were required to submit to in-home visits as a condition of receiving assistance. *Id.* at 313-14. The Court rejected a Fourth Amendment challenge "for the seemingly obvious and simple reason that we are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term." *Id.* at 317. "If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search." *Id.* at 317-18.

To be certain, the Court noted, in dicta, "that the beneficiary's denial of permission [was] not a criminal act," *id.* at 317, and that there was a question as to whether "the average beneficiary might feel she is in no position to refuse consent to the visit," *id.* at 318. But those issues would have been relevant to whether the in-home visit requirement was an unconditional condition—not whether

a beneficiary could raise a Fourth Amendment objection when there was no search. The Court did not have to pass on that issue though because it held, in the alternative, that the search would have been reasonable under the Fourth Amendment had it occurred. *Id.* at 318-26.

Here, the unconstitutional-conditions question that *Wyman* did not reach is presented. Whether Birchfield may be convicted of a misdemeanor for refusing to take the chemical test therefore must be analyzed through that lens. *See infra* 24-34. Birchfield cannot avoid that issue by framing this as a Fourth Amendment case.

The North Dakota law also does not directly violate any other constitutional provision. Although Birchfield fails to mention it, the Court consistently has approved of such statutes, and the consequences they imposed, against all manner of challenges. In *Breithaupt v. Abram*, 352 U.S. 432 (1957), for example, the Court rejected the petitioner's argument "that his conviction, based on the result of [an] involuntary blood test, deprived him of his liberty without that due process of law guaranteed him by the Fourteenth Amendment," *id.* at 434. The Court held that the "absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right." *Id.* at 435. "It might be a fair assumption," the Court added, "that a driver on the highways in obedience to a policy of the State, would consent to have a blood test made as part of a sensible and civilized system protecting himself as well as other citizens not only from the hazards of the road due to drunken driving, but also from some use of dubious lay testimony." *Id.* at 435 n.2. An involuntary "blood test taken by a skilled technician is not such conduct that shocks the conscience, nor such a method of

obtaining evidence that it offends a sense of justice." *Id.* at 437 (citations and quotations omitted).

The Court likewise upheld against a due process challenge "a Massachusetts statute that mandate[d] suspension of a driver's license because of [the person's] refusal to take a breath-analysis test upon arrest for driving while under the influence of intoxicating liquor." *Mackey*, 443 U.S. at 3. The respondent objected to a provision of the Massachusetts "implied consent law" that resulted in the suspension of his license before he received a hearing. *Id.* The Court recognized the driver's "substantial" interest "in continued possession and use of his license pending the outcome of the hearing due him." *Id.* at 11. But "the paramount interest the Commonwealth has in preserving the safety of its public highways" outweighed that substantial interest. *Id.* at 17. In the Court's view, "States surely have at least as much interest in removing drunken drivers from their highways as in summarily seizing mislabeled drugs or destroying spoiled foodstuffs." *Id.*

The Court found that immediate suspension was "critical to attainment" of three important objectives. *Id.* at 18. "First, the very existence of the summary sanction ... serves as a deterrent to drunk driving. Second, it provides strong inducement to take the breath-analysis test and thus effectuates the Commonwealth's interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings." *Id.* And, third, "in promptly removing such drivers from the road, the summary sanction of the statute contributes to the safety of public highways." *Id.* In sum, "the compelling interest in highway safety justifie[d] the Commonwealth in making a summary suspension effective pending the outcome of

the prompt postsuspension hearing available." *Id.* at 19; *Illinois v. Batchelder*, 463 U.S. 1112, 1116 (1983) (per curiam).

Finally, the Court has held "that the admission into evidence of a defendant's refusal to submit to a [chemical] test does not offend the right against self-incrimination." *Neville*, 459 U.S. at 554. South Dakota's "implied consent" law provided that "any person operating a vehicle in South Dakota is deemed to have consented to a chemical test of the alcohol content of his blood if arrested for driving while intoxicated." *Id.* at 559. But South Dakota "declined to authorize its police officers to administer a blood-alcohol test against the suspect's will. Rather, to avoid violent confrontations, the ... statute permits a suspect to refuse the test, and indeed requires police officers to inform the suspect of his right to refuse." *Id.* at 559-60. Exercising that right was "not without a price, however." *Id.* at 560. Foremost, it resulted in a one-year suspension of driving privileges—an "unquestionably legitimate" penalty. *Id.* (citing *Mackey*, 433 U.S. 1).

To "further discourage[]" refusal, South Dakota also made the fact of a defendant's refusal admissible "against the defendant at trial." *Id.* Relying on *Schmerber v. California*, 384 U.S. 86 (1986), which held that admission into evidence of the test result itself did not violate the Fifth Amendment, the Court sustained the penalty for refusing to take a chemical test. If it had a lawful basis for doing so, "the state could legitimately compel the suspect, against his will, to accede to the test." *Id.* at 563. The law "becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice." *Id.* In other words, this was not "a

case where the State has subtly coerced respondent into choosing the option it had no right to compel, rather than offering a true choice." *Id.* at 563-64. "To the contrary, the State wants respondent to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test." *Id.* at 564.

The key insight was that "no impermissible coercion is involved when the suspect refuses to submit to take the test." *Id.* at 562. The Court was under no illusion "that the choice to submit or refuse to take a blood-alcohol test" would be "an easy or pleasant one for a suspect to make." *Id.* at 564. "But the criminal process often requires suspects and defendants to make difficult choices." *Id.* Consequently, "a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination." *Id.*

B. North Dakota's implied-consent statute does not impose an unconstitutional condition on the use of public roads.

Because North Dakota law does not directly violate any provision of the Constitution, the only question in this case is whether it violates the unconstitutional-conditions doctrine. Specifically, the issue is whether conditioning use of North Dakota's roads on consent to a chemical BAC test upon arrest for driving while intoxicated is constitutional. The answer is yes.

Although the Court has sometimes described the unconstitutional-conditions doctrine in absolutist terms,

the decisional history paints a far more balanced picture. Many times, the Court has upheld conditioning benefits or privileges on forgoing a constitutional right. *See, e.g.*, *Lyng v. Automobile Workers*, 485 U.S. 360 (1988); *Grove City Coll. v. Bell*, 465 U.S. 555 (1984); *Connick v. Myers*, 461 U.S. 138 (1983); *Snepp v. United States*, 444 U.S. 507 (1980); *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75 (1947). To the extent that Birchfield claims *all* such conditions are unconstitutional, Br. 33-35, he is wrong.

Birchfield is similarly mistaken in suggesting that, even if such conditions may be upheld as constitutional in other settings, the Fourth Amendment is different. Br. 30. The Court has held, for example, that contractors must "permit inspection of [their] accounts and records" as a condition of "obtain[ing] the government's business." *Zap v. United States*, 328 U.S. 624, 628 (1946), *vacated on other grounds*, 330 U.S. 800 (1947). Such a requirement would be unconstitutional if Birchfield were correct that no conditions may be placed on Fourth Amendment rights. Moreover, there is no basis for giving Fourth-Amendment rights greater protection than First-Amendment speech rights or the Fifth-Amendment right to just compensation. The Court has consistently applied the unconstitutional-conditions doctrine in those areas—sometimes upholding the condition and sometimes striking it down. *See infra* 48-54. There is no basis for applying the doctrine differently here.

Further, Birchfield's bright-line rule would prove too much. If no condition could be placed on Fourth Amendment rights, then statutes that, as a penalty for

refusing a BAC test, suspend the arrestees' license and/or use the refusal as evidence against him in a criminal trial likewise would be unconstitutional. But *Neville* has upheld such laws as within a State's power to impose conditions on individuals who use its roads. In other words, the Court has not only upheld the constitutionality of such conditions in the context of the Fourth Amendment generally, it has upheld them in *this* particular Fourth Amendment context.

That is why *McNeely* described "implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense" as being among the "broad range of legal tools" that States may use "to enforce their drunk-driving laws and to secure [blood-alcohol] evidence without undertaking warrantless nonconsensual blood draws." 133 S. Ct. at 1566 (2013) (plurality opinion).[7] As the opinion explained, "[s]uch laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against

7. Although this section of *McNeely* did not command a majority of the Court, no opinion in *McNeely* expressed disagreement with the plurality's endorsement of implied-consent laws as a constitutional response to the epidemic of drunk driving. Quite the opposite, the plurality highlighted these laws to blunt criticism from the concurring and dissenting opinions that the ruling was going to undermine effective enforcement of drunk-driving laws. *McNeely*, 133 S. Ct. at 1569, 1573-74 (Roberts, C.J., concurring and part and dissenting in part); *id.* at 1576-78 (Thomas, J., dissenting).

him in a subsequent criminal prosecution." *Id.* (citations omitted). Yet there was no indication that these laws might be vulnerable to attack on unconstitutional-conditions grounds.

The issue, accordingly, is not whether North Dakota may "impose significant consequences" for refusing to take a chemical test in violation of its implied-consent statute. It may. The issue is whether making that refusal a misdemeanor requires a different answer. In examining that question, the Court should weigh the same factors it has in previous cases of this type: (1) the importance of the governmental interest; (2) the nature of the constitutional interest and the degree of interference with it; and (3) the significance of the condition the law imposes. *Neville*, 459 U.S. at 558-64; *Mackey*, 443 U.S. at 11-17. These factors weigh in favor of upholding the condition.

First, the Court has conclusively found that States have a "compelling governmental interest in combating drunk driving." *McNeely*, 133 S. Ct. at 1565; *id.* at 1571 (Roberts, C.J., concurring in part and dissenting in part). This follows from the understanding that States have a "compelling interest in highway safety." *Mackey*, 443 U.S. at 19; *Dixon v. Love*, 431 U.S. 105, 114 (1977) (recognizing "the important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard"); *Reitz v. Mealey*, 314 U.S. 33, 36 (1941) ("The use of the public highways by motor vehicles, with its consequent dangers, renders the reasonableness and necessity of regulation apparent.").

The causal relationship between highway safety and drunk driving "is well documented and needs no detailed

recitation here." *Neville*, 459 U.S. at 558; *Breithaupt*, 352 U.S. at 439 ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield."). "For decades," "this Court has 'repeatedly lamented the tragedy.'" *Sitz*, 496 U.S. at 451 (quoting *Neville*, 459 U.S. at 558). Although "some progress has been made, drunk driving continues to exact a terrible toll on our society." *McNeely*, 133 S. Ct. at 1565. North Dakota is sadly no exception. *See supra* at 2-10.

North Dakota's implied consent and criminal refusal laws substantially advance this "paramount interest" in multiple ways. *Mackey*, 443 U.S. at 17. It is settled law that penalizing refusal "serves as a deterrent to drunken driving." *Id.* at 18. Experience has shown, moreover, that making refusal a misdemeanor more effectively deters drunk driving. Offenders effectively can circumvent the administrative penalty of license revocation, thereby stripping that penalty of its deterrent value. *See supra* 7; HB1302 History at 2-3. Statistics bear this out. Since 2012, when North Dakota passed Brielle's law to provide criminal penalties for BAC test refusal, drunk-driving fatalities have dropped 38%; and the percentage of automobile-crash fatalities that were alcohol-related fell to a decade low. *See supra* 9-10.

Making refusal a misdemeanor also "provides strong inducement to take the ... test and thus effectuates [North Dakota's] interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings." *Mackey*, 443 U.S. at 18. Indeed, one of the primary purposes of Brielle's law was to encourage drunk-driving arrestees to opt to take the chemical test. Given the high

rate of refusals under the prior version of the statute, lawmakers were rightly concerned that arrestees viewed administrative penalties as an easily evaded "loophole" that would allow them to escape punishment "no matter how intoxicated [they] are." HB1302 History at 155-56.

Finally, the law reduces the likelihood of potentially violent encounters between police and drunk drivers. If a refusal is not criminalized, police are more likely to proceed with chemical testing either after securing a search warrant or immediately if exigent circumstances exist. This is due to the centrality of such evidence to a successful drunk-driving prosecution. *See infra* 41. The police will have no choice but to press ahead (possibly forcibly) with a test they likely need to secure conviction.

But forcing this confrontation is a bad idea. Because the arrestee is intoxicated, often highly so, pressing ahead with the test in the face of a refusal creates a high risk of a physical confrontation. Using force to administer the test is not in the interest of police officers, arrestees, or the medical personnel stuck between them. And it would present a particularly grave risk of danger to law enforcement officers in rural parts of North Dakota, where there often is only one officer on duty at any given time. *See supra* 7. Thus, criminalizing the refusal to take chemical tests is likely to reduce the occurrence of dangerous situations in which police offers must take non-consensual chemical testing from arrestees.

Second, the constitutional interest that Birchfield invokes—the right to refuse a chemical test—is far from the Fourth Amendment's core. As an initial matter, the test is taken only after the individual has been placed

under arrest based on probable cause that he was driving under the influence of alcohol or drugs. *See supra* 8-9. The context of when and where the chemical test occurs is important. "The expectations of privacy of an individual taken into police custody 'necessarily [are] of a diminished scope.'" *Maryland v. King*, 133 S. Ct. 1958, 1978 (2013) (quoting *Bell v. Wolfish*, 441 U.S. 520, 557 (1979)). That is not to suggest that a person arrested for drunk driving lacks any expectation of privacy. *McNeely*, 133 S. Ct. at 1558. "Once an individual has been arrested on probable cause for a dangerous offense that may require detention before trial, however, his or her expectations of privacy and freedom from police scrutiny are reduced." *King*, 133 S. Ct. at 1978.

More fundamentally, the fact that the right invoked here will rarely be sustainable even in the absence of consent highlights the relative weakness of Birchfield's interest. Birchfield frames the constitutional interest that he seeks to preserve as the "constitutional right to resist a search that is not supported by a warrant or an exception to the warrant requirement." Br. 4. In evaluating where on the spectrum of Fourth-Amendment rights this interest falls, the Court must therefore analyze how often the right to refuse the chemical test will actually result in no search in the absence of the criminal-refusal statute. An implied-consent law, for example, that required residents to allow the police to search their homes whenever they knock on the front door and request entry would interfere with a right that goes to the heart of the Fourth Amendment; it is safe to say that the vast majority of those searches would not occur without consent. By contrast, a statute requiring foster parents to consent to a search of their homes upon a finding of probable cause of child endangerment would

not raise the same Fourth Amendment concerns; most of those searches are going to occur—consent or not.

Here, the suspect's refusal will almost never be an impediment to conducting the search as far as the Fourth Amendment is concerned. In *McNeely*, the Court divided over whether the need to perform a timely chemical test before the evidence dissipates always, often, or sometimes will create the exigent circumstances needed to dispense with the warrant requirement. 133 S. Ct. at 1558-68; *id.* at 1570-73 (Roberts, C.J., concurring in part and dissenting in part); *id.* at 1575-78 (Thomas, J., dissenting). But no Member of the Court suggested that an arresting officer would have difficulty making out the probable cause needed to justify the search. In the overwhelming majority of instances, that is, the suspect's ultimate right "to refuse the blood-alcohol test" will be "simply a matter of grace bestowed by the [North] Dakota legislature." *Neville*, 459 U.S. at 565. Whether he consents or not, the police will be able to perform the test.

The regrettably typical circumstances of Birchfield's arrest illustrate the point. After having driven his car into a ditch and exhibiting numerous signs of intoxication to the responding trooper, he failed all four field sobriety tests he was administered and failed a breath test with a BAC over three times the legal limit. *See supra* 10-12; Brief for Respondent at 3-4, *Beylund v. Levi*, No. 14-1507 (Mar. 15, 2016) ("Beylund Br."). It cannot be disputed that there was probable cause justifying the chemical test.

Furthermore, not only is the right to refuse this test at the periphery of the Fourth Amendment, but it causes only minimal intrusion. The chemical test of course is a

search. *McNeely*, 133 S. Ct. at 1558-60. At the same time, however, "[s]uch tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." *Schmerber*, 384 U.S. at 771; *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 625 (1989) ("[T]he intrusion occasioned by a blood test is not significant."). They are in fact "so safe, painless, and commonplace," the police may "compel the suspect, against his will, to accede to the test." *Neville*, 459 U.S. at 563; *McNeely*, 133 S. Ct. at 1565.

Third, and last, use of public roads, both as a matter of precedent and North Dakota law, is a privilege that the State is not required to extend. *See, e.g.*, *Kane v. New Jersey*, 242 U.S. 160, 167 (1916) ("The power of a state to regulate the use of motor vehicles on its highways has been recently considered by this court and broadly sustained. It extends to nonresidents as well as to residents."); *State v. Kouba*, 319 N.W.2d 161, 163 (N.D. 1982) ("The use of the public highways is not an absolute right which everyone has, and of which a person cannot be deprived; it is instead a privilege which a person enjoys subject to the control of the State in its valid exercise of its police power."). "The highways belong to the state. It may make provision appropriate for securing the safety and convenience of the public in the use of them." *Buck v. Kuykendall*, 267 U.S. 307, 314 (1925) (citation omitted)). Birchfield does not disagree. Br. 34.

That is not to suggest that access to North Dakota's public roads is unimportant. Indeed, Birchfield anchors his argument to the proposition that "the ability to drive is

a practical necessity for most adults in our society" given that they are "entirely dependent on their ability to drive to commute to work, attend school, buy groceries, or visit a doctor." Br. 22-23. Birchfield, in other words, targets "[d]rivers' license suspension or revocation" itself as the penalty that cannot be imposed for revoking consent. Br. 36. But that argument is foreclosed in light of *Neville*. *See supra* 23-24.

To prevail, Birchfield must explain why making his refusal a misdemeanor is unconstitutional even though revocation of his license, which "effectively precludes many people from earning a living or engaging in the necessities of daily life," Br. 36, "is unquestionably legitimate, assuming appropriate procedural protections," *Neville*, 459 U.S. at 560. But Birchfield offers no serious argument on that score. The most he will say is that the Court has not yet upheld a condition that imposed criminal penalties. Br. 38. But that just begs the question; the Court has not previously confronted the issue.

Furthermore, the bare fact that revoking consent has criminal consequences, in and of itself, does not cross a constitutional line. The Court has upheld using refusal as evidence to secure a criminal conviction. *Neville*, 459 U.S. at 563-64.[8] And, importantly, this not a case in which the

---

8. Moreover, a number of States permit the imposition of civil fines as part of their administrative remedies. *See, e.g.*, N.Y. Veh. & Traf. Law § 1194(2)(d)(2) ("[A]ny person whose license, permit to drive, or any non-resident operating privilege is revoked pursuant to the provisions of this section shall also be liable for a civil penalty in the amount of five hundred dollars."). Birchfield makes no effort to explain why imposing such penalties through an administrative process is constitutionally acceptable but imposing them criminally (almost always as a misdemeanor) is not.

driver is charged with a felony. That might be a different situation; the collateral consequences of a felony conviction would need to be factored into the equation. ACLU Amicus Br. 13-14. Here, the misdemeanor penalties for refusal are no more severe than the penalties for failing the test at the lowest level (0.08% BAC). *See supra* 9.

Birchfield is thus left with a reductionist argument: "it should be obvious that there is a material difference between license-revocation statutes" and those carrying criminal sanctions. Br. 40. But given his description of driver's licenses as indispensable to the ability to "earn a livelihood or participate meaningfully in society," Br. 36, and his failure, in turn, to explain why a misdemeanor charge is different in kind than the civil penalties he must accept as constitutional, the assertion is far from obvious. As Birchfield frames the role of driving in modern society, arrestees might well choose a misdemeanor conviction over suspension of their license.

At bottom, there is no dispute that North Dakota's criminal refusal law increases pressure on those arrested for driving under the influence of alcohol or drugs to consent to a chemical test. That is a primary purpose. That is the beginning of the unconstitutional-conditions inquiry, however, not the end of it. The Court's decisions in this area reflect an attempt to balance the individual's interest in refusing consent against the State's interests in public safety.

North Dakota struck the appropriate balance for its citizens. North Dakota's interest is compelling, Birchfield's right is at the periphery of the Fourth Amendment, the intrusion occasioned by the chemical test is minimal, and

making the revocation of consent a misdemeanor does not raise special concerns beyond those presented by the civil and criminal-evidentiary penalties that *Neville* sustained. The Supreme Court of North Dakota correctly upheld the law as a constitutional condition.

C. No other decision requires the Court to declare North Dakota's statutory scheme unconstitutional.

Birchfield relies on an array of cases to contend that precedent forecloses upholding the North Dakota law as a constitutional condition. If anything, as explained above, he has it backwards. Regardless, no decision upon which Birchfield relies supports his argument.

Birchfield first argues that his consent was invalid under "the traditional totality of the circumstances test." Br. 22. But Birchfield confuses two distinct concepts. For purposes of the Fourth Amendment, consent must be individualized and voluntary based on the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-27 (1973). That is why the officers, in accordance with North Dakota law, informed Birchfield of the implied-consent statute, of his right to revoke consent, and the consequences of doing so. *See supra* 10-12. That process ensured that Birchfield's consent would have been upheld as voluntary under the Fourth Amendment had he, like Beylund, taken the chemical test and then tried to suppress it in the drunk-driving proceeding. Beylund Br. 3-6.

But those requirements have no bearing on whether an implied-consent law fails for lack of voluntariness when

no Fourth-Amendment search occurs. The question here, as explained above, is whether the statutory condition is unconstitutional—not whether it satisfies the *Schneckloth* voluntariness test. Petitioner cannot bypass that inquiry on the assumption that attaching any condition on the use of state roads is always "the product of 'duress or coercion, express or implied.'" Br. 22 (quoting *Schneckloth*, 412 U.S. at 248). The question does not answer itself. If it did, the civil penalties for refusing the chemical test would be invalid too.

Birchfield's reliance on the "special needs" line of decisions also misses the mark. Br. 15-18. Those cases defined "the limited circumstances in which suspicionless searches are warranted." *Chandler v. Miller*, 520 U.S. 305, 308 (1997) (citing *Skinner*, 489 U.S. at 608-13). But those decisions are irrelevant. Birchfield was not searched, so no exception to the warrant and probable cause requirements is needed. *See supra* 10-12. This same distinction defeats his reliance on *Patel*. Br. 27-28. *Patel* involved "the administrative search exception to the warrant requirement," which is a species of "special needs" cases. 135 S. Ct. at 2452. This is not an administrative search case.

Finally, Birchfield is similarly misguided in seeking support from *Camara v. Municipal Court of City and Cty. of San Francisco*, 387 U.S. 523 (1967). Br. 31-32. *Camara* announced two important propositions. First, the Fourth Amendment warrant requirement applies to "municipal fire, health, and housing inspection programs ... to determine whether physical conditions exist which do not comply with minimum standards prescribed in local regulatory ordinances." *Camara*, 387 U.S. at 530. Second,

"'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." *Id.* at 538. For reasons described above, this case implicates neither holding.

Birchfield therefore must concede that *Skinner*, *Patel*, and *Camara*, by their terms, do not apply here because Birchfield was not searched. Birchfield's actual argument seems to be that "the Court could have" analyzed those cases under the unconstitutional-conditions doctrine, but it "did not look" at them "in those terms." Br. 30. But this is incorrect. The Court "follow[s] the principle of party presentation" because "the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008) (citation omitted). This is why the Court typically refrains from addressing arguments not "urged by either party" or "presented to or passed on by the lower courts." *Wolfish*, 441 U.S. at 531 n.13. The unconstitutional-conditions doctrine was not raised by the parties or presented to the lower courts in any of those cases.

Nor could it have been in the majority of them. The Court could not "have said" in *Patel* that "the government conditioned grant of the license to operate a hotel on the hotel owner's submission to a warrantless search." Br. 30. That is not how the municipal ordinance in question functioned. *Patel*, 135 S. Ct. at 2447-48. Likewise, the Court could not have said that San Francisco "had attached submission to a warrantless search as a condition on the right to live, or operate a warehouse." Br. 32. That is not how the San Francisco ordinance worked either.

Camara, 387 U.S. at 525-26 & n.1; *See v. City of Seattle*, 387 U.S. 541, 541-42 & n.1 (1967) (same).

Notably, the unconstitutional-conditions argument might have been available in at least some of the "special needs" cases upon which Petitioner relies. In *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), the Court limited review to the lower "court's holding on the 'special needs' issue" and "assume[d] for purposes of [its] decision—as did the Court of Appeals—that the searches were conducted without the informed consent of the patients," *id.* at 76. The Court "reversed and ... remanded for a decision on the consent issue." *Id.* In *Skinner* and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), the United States declined to raise implied consent. The Court thus had no occasion to reach the issue.

More fundamentally, Birchfield believes that the implied-consent argument proves too much. In his view, if it is a winning argument here, it would have been a winning argument in *Patel* and *Camara* too. He is incorrect. Even accepting the counterfactual assertion that the argument was available in those cases, it is far from clear that it would have prevailed.

For example, *Patel* would have involved the physical search of business records as a condition of operating in the city to "ensure compliance with [a] recordkeeping requirement." 135 S. Ct. at 2452. *Camara* similarly would have involved the physical search of a home as a condition of residing in the jurisdiction to guard against "possible violations of the city's Housing Code." 387 U.S. at 526. Compared to North Dakota's statute, then, these hypothetical laws would have required implied consent to

more intrusive searches based on far less individualized suspicion of wrongdoing, and which, at least at first blush, would do substantially less to advance weaker government interests. The fact this argument was not raised in *Patel* or *Camara* thus sheds no light on the proper resolution of this case.

II. Invalidating North Dakota's Statutory Scheme Would Undermine The States' Ability To Protect The Public From Drunk Drivers.

The Court's approach to issues like this has been, above all, practical. That is the lesson of the Court's free speech, takings, and spending cases. The consequences of forbidding States from making revocation a misdemeanor are significant. Traffic safety, public health, and legal experts broadly agree that refusal laws, such as North Dakota's, are needed to combat drunk driving. Upholding them would not, as Birchfield suggests, eviscerate decisions such as *McNeely*. The legal penalties for a drunk-driving conviction, in many cases, will be more severe than the penalty for revoking consent to take the chemical test. Upholding these laws would appropriately recognize that arrestees have a Fourth Amendment right to revoke their consent, but exercising that constitutional right is not always costless.

A. Refusal laws are important tools in the battle against drunk driving.

For more than 60 years, this Court has emphasized the important role implied-consent laws play in protecting the public and ensuring safe roads. *See supra* 21-25. Most recently, *McNeely* pointed to N.D. Cent. Code § 39-20-

01 (among other state laws) as demonstrating why the ruling was not going to "compromis[e] drunk-driving enforcement efforts in the States" or "severely hamper effective law enforcement." 136 S. Ct. at 1566-67 & n.9 (quoting *Tennessee v. Garner*, 471 U.S. 1, 19 (1985)). The Court's endorsement of these laws is an important consideration. "A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality." *John Doe No. 1 v. Reed*, 561 U.S. 186, 221 (2010) (Scalia, J., concurring in the judgment) (citations and quotations omitted).

North Dakota and other States have taken to heart the Court's decades-long guidance in this area as they developed and implemented strategies to combat drunk driving. This is a serious problem with which the States continue to struggle: the NHTSA reported 9,967 alcohol-impaired-driving fatalities in 2014 alone, constituting 31 percent of all traffic-related fatalities that year. NHTSA, Traffic Safety Facts, 2014 Crash Data Key Findings 1 (No. 812219, Nov. 2015), http://goo.gl/k63prg. Since 2000, more Americans have lost their lives in alcohol-related traffic accidents than in every armed conflict from Vietnam through the present combined. *See supra* 1-2. In the face of this ongoing crisis on America's roads, the States have found refusal penalties to be a key piece of their overall efforts to fight drunk driving.

The practical need for refusal penalties is clear. If a suspect who has been arrested for drunk driving can freely refuse a drug or alcohol test (notwithstanding the implied consent statute), he can deprive law enforcement of key (often essential) evidence necessary to prove

impairment and to prosecute drunk driving. There is little doubt that the absence of testing evidence can prevent accountability for intoxicated drivers. An exhaustive 2002 study surveyed 390 experienced DWI prosecutors from 35 states and concluded that:

- "Almost ¾ of the prosecutors surveyed reported that a BAC is the single most convincing piece of evidence that can be presented to a jury."

- "[O]fficers experience some form of refusal in 1/3 of their DWI investigations."

- "92% of prosecutors reported that test refusal is more common among repeat offenders."

Robyn D. Robertson and Herb M. Simpson, *DWI System Improvement for Dealing with Hard Core Drinking Drivers*, Traffic Injury Research Foundation xiii (June 2002), http://goo.gl/au17t5. Public health researchers have likewise determined that "there is strong evidence that BAC test refusals significantly compromise the arrest, prosecution, and sentencing of DUI suspects and the overall enforcement of DUI laws in the United States." Robert B. Voas, et al., *Implied-consent laws: A review of the literature and examination of current problems and related statutes*, 40 J. of Safety Research 77, 77 (2009).

This is consistent with North Dakota's experience. Testimony supporting the statutory amendment noted the difficulty prosecutors face in securing convictions without scientific evidence to supplement subjective observations

of police officers. HB History 1302 at 156; Tina Wescott Cafaro, *Fixing the Fatal Flaws in OUI Implied Consent Laws*, 34 J. Legis. 99, 112 (2008) (noting that when no BAC is offered, the jury may believe "the police didn't offer the breathalyzer to a defendant [because they didn't think the defendant was too intoxicated]").

Test refusal is particularly troublesome given that most States now punish drivers based on their actual BAC, rather than circumstantial proof of impairment. Spurred in part by federal law linking transportation funding to the enactment of these statutes, 23 U.S.C. § 163(a); 23 C.F.R. § 1225.1, all States now permit conviction with a BAC of 0.08% or greater—regardless of whether there is other proof of impairment. N.D. Cent. Code § 39-08-01(1)(a). Like many states, North Dakota also provides for aggravated penalties when a first offender's BAC is 0.16% or higher. N.D. Cent. Code § 39-08-01(5)(a)(2). Refusal frustrates these laws by depriving the State of evidence it needs to obtain a conviction under these provisions.

Those individuals who drive under the influence—and especially repeat offenders—are aware of the importance of BAC evidence and frequently refuse to submit to testing for strategic reasons. NHTSA, Alcohol & Highway Safety: A Review of the State of Knowledge 174 (No. 811374, Mar. 2011) ("[M]ultiple offenders were more likely than first offenders to refuse the chemical test."), http://goo.gl/T2OWW5. In 2011, NHTSA reported that the median refusal rate nationwide was 24 percent and, in some places, ranged as high as 80 percent. NHTSA, Breath Test Refusal Rates in the United States–2011 Update 1 (No. 811881, Mar. 2014), http://goo.gl/pKrccz. North Dakota's refusal was 21 percent. *Id.* at 2.

Increasing the penalties for refusal was the natural response to these studies. For years, these penalties were administrative in nature—license suspension or revocation, as well as fines. But as States have increased the punishments for drunk driving, administrative sanctions have increasingly come to be seen as insufficient. When "[t]he sanctions for test refusal are far less severe than those for taking the test and failing it," refusal becomes an obvious strategy. Robertson, *supra*, at xiii. "Thus, the work that advocacy groups and others have done to pass laws and implement other measures to reduce impaired driving based on an objective measure of BAC may be rendered less effective by increases in refusals." Voas, *supra*, at 78.[9]

Moreover, administrative penalties alone are often insufficient to change behavior because many people drive with suspended licenses. One NHTSA study revealed that almost *70 percent* of drivers whose licenses were suspended for driving while intoxicated were observed driving during the period of their suspension. NHTSA, Extent of Driving While Suspended for DWI (No. 278, July 2003), http://goo.gl/Y9z05i. This was of specific concern to the North Dakota legislature when it elected to criminalize refusal. *See supra* 7; HB History 1302 at 3, 62

---

9. The defense bar is aware of the disparity between civil and criminal penalties. For example, a lawyer in Kentucky, a state that does not criminalize refusal, advises drunk-driving arrestees that "[a]ny attorney worth his salt will tell you to refuse" testing and that "despite these seemingly harsh [administrative] consequences of refusal, *it is still beneficial for you to refuse*!" Larry Forman, *Why You Should Always Refuse the Breathalyzer and the Standardized Field Sobriety Tests*, Larry Forman Law Blog (May 11, 2014), https://goo.gl/zjfaAy.

(noting that license suspensions and other civil remedies were insufficient to deter drunk driving).

For these reasons, there is a growing consensus that criminalizing refusal is needed to protect the public from drunk drivers. NHTSA has endorsed increased penalties for test refusal as a solution that is inexpensive, easy to implement, and "[l]ikely to be effective based on balance of evidence from high-quality evaluations or other sources." NHTSA, Countermeasures That Work: A Highway Safety Countermeasure Guide for State Highway Safety Offices, 1-7, 1-9 (No. 811727, April 2013), http://goo.gl/2K7mZY; *id.* at 1-17 ("Criminalizing test refusal decreases the likelihood that impaired drivers can avoid penalties by refusing to be tested. It also ensures the driver will be identified as a repeat offender upon subsequent arrests.").[10] The National Committee on Uniform Traffic Laws and Ordinances (NCUTLO), accordingly, has included criminalization of refusal in its DWI Model Code. NCUTLO DWI Model Code § 102(a), *available at* http://goo.gl/BVjwku. The federal government also has criminalized refusal of a blood-alcohol test on federal property. 36 C.F.R. § 4.23(c)(2).

---

10. *See also* Robertson, *supra*, at 49 (recommending that States "[m]ake refusal a criminal offense" and noting that a criminal conviction will "ensure that suspects who refuse are correctly identified as a repeat offender on a subsequent arrest, even if they are not convicted on the original DWI charge"); Voas, *supra*, at 82 ("[E]xtending just the length of [administrative license suspension] for refusal is not likely to be highly effective if the penalties for conviction are greater[.]"); Cafaro, *supra*, at 121 ("[I]mposing criminal sanctions to accompany the administrative penalty of loss of license or fine will increase the costs of refusing and thus encourage more people to take the BAC test.").

North Dakota's refusal penalties advance a second public interest: safety for officers and arrestees when the latter deny consent. As explained above, employing refusal penalties in lieu of permitting forcible searches of objecting arrestees helps "avoid violent confrontations" where officers face the prospect of forcibly taking blood from resisting offenders. *Neville*, 459 U.S. at 559-60; *Murphy*, 516 N.W.2d at 287; *Nyflot v. Comm'r of Pub. Safety*, 369 N.W.2d 512, 517 (Minn. 1985). North Dakota was particularly concerned about ordering officers to "physically hold [a person] down," as that could lead to aggressive confrontations and endanger officers, "especially [those] in rural [North Dakota] where there may be only one officer." HB History 1302 at 3.

Birchfield's attacks on these efficacy and policy reasons for criminalizing refusal are misleading and unpersuasive. First, he cites the *partial* findings from *one* county in New Mexico in *one* NHTSA study for the sweeping proposition that "[p]rosecutors obtain convictions for drunk driving at about the same rate regardless of whether or not [BAC] test evidence was available." Br. 41. But that same study acknowledged that "[t]he relationship between statewide refusal rates and conviction rates is complex" and influenced by many factors, and that "in the two study sites with the highest conviction rates ..., the State had criminalized refusal, and both sites prosecuted a very high percentage of those arrested for DWI." NHTSA, Breath Test Refusals and Their Effect on DWI Prosecutions 45-46 (No. 811551 July 2012), http://goo.gl/AbcInm. Moreover, other surveys—including one involving hundreds of front-line prosecutors—have consistently found refusal to be an obstacle to the enforcement of drunk-driving laws, particularly with respect to recidivist offenders. *See supra* 41.

Second, Birchfield mischaracterizes NHTSA's recommendation that States provide criminal penalties for refusal, suggesting that its three-star ranking of that proposal is "mediocre." Br. 44. In truth, the guide itself defines the rating as "*Likely to be effective* based on balance of evidence from *high-quality evaluations.*" Countermeasures That Work, *supra*, at 1-9 (emphasis added). Moreover, out of 33 rated countermeasures, enhanced penalties for refusal was one of only a handful that NHTSA rated three stars or better *and* was identified as inexpensive and capable of rapid implementation. *Id.* at 1-7, 1-8, 1-9. The cost and speed of implementation are important considerations that the State naturally can take into account when employing the "broad range of legal tools" available to it in the fight against drunk driving. *McNeely*, 133 S. Ct. at 1566.

In fact, Birchfield's proffered alternatives have their own significant drawbacks. For example, he touts the installation of ignition interlocks as a more effective way to combat drunk driving than criminalization. Br. 45-46. But NHTSA itself acknowledges that implementation of an interlock program is more expensive and time-consuming than the approach North Dakota adopted. Countermeasures That Work, *supra*, at 1-8. Moreover, compliance with interlock requirements is spotty, and (unlike penalties for revoking consent) the technology does nothing to combat drunk driving by first-time offenders. *Id.* at 1-34-1-36.

Birchfield also incorrectly faults North Dakota for providing enhanced penalties only to those offenders with a BAC of 0.18% or higher, rather than 0.16%. Br. 46. He has his facts wrong. North Dakota *has* implemented

the 0.16% standard. N.D. Cent. Code § 39-08-01(5)(a)(2) ("[F]or a first offense when the convicted person has an alcohol concentration of at least *sixteen one-hundredths of one percent* by weight, the offense is an aggravated first offense and the sentence must include a fine of at least seven hundred fifty dollars and at least two days' imprisonment.") (emphasis added).[11] More importantly, North Dakota will be unable to obtain the evidence necessary to support convictions and penalties based on that BAC if it cannot provide adequate incentives to discourage test refusal.

Which brings us to Birchfield's real goal: to require a warrant in every case. *See, e.g.*, Br. 43-44; *id.* at 46 ("As the Court has said in a closely analogous situation, the 'answer to the question of what police must do before [requiring a test of a driver's blood, breath, or urine] is accordingly simple—get a warrant.'") (citation omitted). Of course, Birchfield's reliance on the availability of electronic warrant procedures ignores *McNeely's* express approval of a wide range of alternative measures to fight drunk driving. And the Court in *McNeely* correctly noted that electronic warrants are not the panacea that Birchfield claims. *McNeely* 133 S. Ct. at 1562. Birchfield's preference for warrants over all other tools to obtain BAC information also would lead to a perverse result: more involuntary searches of drunk driving arrestees, which undoubtedly would increase the likelihood of violent confrontations that BAC test refusal penalties are intended to avoid. *See supra* 45.

---

11. In any event, neither of the two threshold amounts would have been sufficient to deter Petitioner, whose breath test registered a BAC of 0.254 percent—higher than that of the drivers who killed the Deuscher family and the Ruiz children, *see supra* 4-5.

In the end, Birchfield would have this Court deal a huge blow to law enforcement. States have developed and implemented strategies based upon decades of precedent granting them broad powers to regulate the use of their roads to protect the public, as well as the specific power to impose "unquestionably legitimate" penalties for refusal of a blood-alcohol test, *Neville*, 459 U.S. at 560. Reversing course would significantly impair the States' ability to ensure public safety. These practical concerns must weigh heavily in the analysis of whether North Dakota may make Birchfield's revocation of consent a misdemeanor.

B. Upholding North Dakota law is consistent with the Court's broader approach to the unconstitutional-conditions doctrine.

Contrary to Birchfield's all-or-nothing position, Br. 10-11, the Court's approach to the unconstitutional-conditions doctrine has accommodated the kind of practical concerns identified above. In many contexts, the Court has approved of conditions tied to a government benefit that could not have been imposed directly. That same approach should apply here.

The Court's analysis of unconstitutional-conditions claims that certain restrictions imposed on the recipients of government funding violate the First Amendment provides an important starting point. Few doubt that the government can "make no law ... abridging the freedom of speech." U.S. Const. amend. I. Under Birchfield's broadest view, then, all of these cases easily could be resolved: if the government cannot restrict protected speech directly, it should never be able to restrict or compel speech as a part of any government benefit or program. But this Court has

repeatedly acknowledged that some restrictions on speech are permissible, even where they could not otherwise be mandated directly.

For example, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court upheld restrictions in the Public Health Service Act prohibiting the use of federal funds appropriated for family-planning services "in programs where abortion is a method of family planning," *id.* at 178 (quoting 42 U.S.C. § 300a-6). Acknowledging its prior decisions prohibiting unconstitutional conditions in benefit programs, the Court nonetheless held that "[t]he employees' freedom of expression is limited during the time that they actually work for the project, but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority." *Id.* at 199. The Court acknowledged that in other cases, the same limitation would not necessarily survive—such as when the government used a subsidy to restrict "speech in areas that have 'been traditionally open to the public for expressive activity,' ... or have been 'expressly dedicated to speech activity.'" *Id.* at 200 (internal citations omitted). Therefore, the constitutionality of the condition depended on a particularized assessment of the nature of the subsidy and the reach of the condition. *Grove City Coll.*, 465 U.S. at 575 ("Congress is free to attach *reasonable* and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept") (emphasis added).

A similar thread runs through this Court's analysis of restrictions on the speech and political affiliation of government employees. In *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), the Court noted that "[u]nder

our sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, *unless the government has a vital interest in doing so*," *id.* at 78 (emphasis added). The Court thus has often assessed the government's particular interest and found that the First Amendment did *not* prohibit a condition on government employment that would have been unconstitutional had it been applied to the public at large.

For example, in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court reiterated the general rule that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression," *id.* at 413 (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983). But it nonetheless held that the First Amendment did not "shield[] from discipline the expressions employees make pursuant to their professional duties." *Id.* at 426. The Court reached this conclusion based on a careful assessment of the legitimacy of the government's interest in managing its own employees as compared to the minimal value it placed on protecting the speech at issue. *Id.* at 420-24. Throughout the opinion, the Court necessarily considered the practical effect of the speech restriction and the harm a contrary rule would cause. *Id.* That the government could not restrict this speech but for the right to place a condition on employment did not make the restriction unconstitutional.

Similarly, the Court's decision in *Branti v. Frankel*, 445 U.S. 507 (1980), recognized that "if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may

be required to *yield to the State's vital interest in maintaining governmental effectiveness and efficiency*," *id.* at 517 (emphasis added). Therefore, "the Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments." *Id.* at 518. Again, the fact the government could not constitutionally take adverse action against a citizen-at-large based on her party affiliation did not prohibit party affiliation from being an acceptable condition of employment under those circumstances.

The Court's analysis of unconstitutional-conditions claims under the Takings Clause follows the same pattern. The Court has been mindful of the need to protect "the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). At the same time, the Court has understood that "[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy" and has "long sustained such regulations against constitutional attack." *Id.* at 2595 (citation omitted). To balance these concerns, the Court has required "an essential nexus" between a "legitimate state interest" and the permit condition, as well as that the condition "is related both in nature and extent to the impact of the proposed development." *Dolan v. City of Tigard*, 512 U.S. 374, 386, 391 (1994). This requirement of "rough proportionality," *id.* at 391, recognizes that while the government may have legitimate reasons to impose a condition on landowners' permits, the condition will need

to be justified in light of the alleged governmental need and the degree of infringement on the landowner's right, *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (the "constitutional propriety" of the condition must "further the end advanced as the justification for the prohibition.").

Even those cases that speak directly of the need to avoid "coercing" a party into surrendering constitutional rights still require a tailored analysis of the condition. Thus, in *South Dakota v. Dole*, 483 U.S. 203 (1987), the Court approved a condition requiring states to raise their drinking ages to receive federal highway funds—"even if Congress may not regulate drinking ages directly," *id.* at 206. In the Court's view, there was no dispute as to "the germaneness of the condition to federal purposes" where "the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel." *Id.* at 208. Moreover, the Court rejected the argument that the financial incentive at stake passed the point where "pressure turns into compulsion," given the relatively small size of the funds at question. *Id.* at 211 (citation omitted). That no State was willing to forego those funds was not decisive: "We cannot conclude ... that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective." *Id.* By contrast, in *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012), the Court did find coercive a Medicaid spending condition that threatened States with the loss of "over 10 percent of a State's overall budget" because, given the State's reliance on Medicaid funding, the condition "accomplishe[d] a shift in kind, not merely degree," *id.* at 2605.

Finally, even in the area of conditions on the use of public roads—the precise government privilege at issue here—the Court has considered the degree of relation between the benefit at issue and the challenged restriction. In *Stephenson v. Binford*, 287 U.S. 251 (1932), this Court rejected a constitutional challenge to a requirement that contract carriers obtain a permit and submit to regulation as a condition of using public highways. The restrictions at issue "rest[ed] definitely upon the policy of highway conservation," *id.* at 275. This distinguished the case from *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926), where the Court has invalidated a California statue requiring a similar permit but which was intended to "protect the business of those who were common carriers in fact by controlling competitive conditions," and had "no relation to the highways." *Stephenson*, 287 U.S. at 275. In other words, the precise relationship between the benefit at issue and the condition mattered—as it does here.

Again, this is not to deny that some conditions on government benefits or privileges may be unconstitutional. But as these cases show, that question *always* requires a close analysis of the propriety and the importance of the government interest, and the extent to which the condition advances it. Whether viewed as sufficiently "germane[]," *Dole*, 483 U.S. at 208, "reasonable," *Grove City*, 465 U.S. at 575, "rough[ly] proportional[]," *Dolan*, 512 U.S. at 391, or "relat[ed]," *Stephenson*, 287 U.S. at 275, the judicial task is the same: the Court must weigh the competing interests and the extent to which the condition advances a proper government objective.

For the reasons set forth above, North Dakota law would meet any of these tests. *See supra* I.B. The law is germane to North Dakota's compelling interest in combatting drunk driving. And there is both a nexus and a rough proportionality between that interest and the condition imposed under the implied-consent statute. Last, making refusal a misdemeanor is reasonable under *Mackey* and *Neville*, when all the factors involved are weighed.

C. North Dakota's implied-consent penalties do not vitiate the expectation of privacy protected by the Fourth Amendment.

Finally, Birchfield incorrectly claims that upholding North Dakota's refusal statute would "vitiate[] the right recognized in *McNeely*." Br. 15. That right, *viz.*, to avoid "warrantless nonconsensual blood draws," *McNeely*, 133 S. Ct. at 1566, remains intact. In North Dakota, once an arrestee revokes consent, he generally will not be subject to such a search.[12] Therefore, refusal means they will typically avoid the test even when police have sufficient grounds to obtain a warrant and could take the sample from a non-consenting party. Further, the imposition of misdemeanor penalties for refusal are not materially different from the administrative penalties upheld in *Neville* and cited favorably in *McNeely*. To be sure,

---

12. That arrestee will never be subject to a warrantless search. North Dakota law enforcement, however, will seek a search warrant authorizing a chemical test where consent has been revoked in limited circumstances. In particular, police often will seek a warrant where the arrestee has caused serious bodily injury or death. *See* N.D. Cent. Code § 39-08-01.2 (enhanced penalties for "criminal vehicular death" and "criminal vehicular injury").

drivers arrested on suspicion of drunk driving may face an unpleasant choice, but this Court has never held that such choices are barred by the Constitution.

Beyond preserving the protection of the "privacy, dignity, and security" of arrestees who wish to avoid a chemical test, *Skinner*, 489 U.S. at 613-14, offenders may have other reasons to stand on their right and deny consent to a search. They may wish to avoid the stigma of a drunk-driving conviction, or collateral consequences in employment or other areas that might not attach to a refusal violation. They may also wish to deprive the State of additional evidence it could use to enhance a sentence. N.D. Cent Code § 39-08-01(5)(a)(2). North Dakota leaves room for arrestees to make that choice.

That the decision comes at a price—in this case, a misdemeanor conviction—is hardly remarkable. This law arises from North Dakota's long-recognized authority to regulate the use of its roads to promote public safety and fits comfortably within the framework of consequences for refusal that this Court has repeatedly upheld. Most importantly, the law advances a critical and compelling state interest to prevent the slaughter that took the lives of innocent victims like Brielle Deutscher and Alaries and Cyris Ruiz.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

THOMAS R. MCCARTHY
WILLIAM S. CONSOVOY
J. MICHAEL CONNOLLY
BRYAN K. WEIR
CONSOVOY MCCARTHY PARK PLLC
GEORGE MASON UNIVERSITY
SCHOOL OF LAW SUPREME
COURT CLINIC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423

PATRICK STRAWBRIDGE
CONSOVOY MCCARTHY PARK PLLC
GEORGE MASON UNIVERSITY
SCHOOL OF LAW SUPREME
COURT CLINIC
10 Post Office Square
8th Floor South PMB
Suite 706
Boston, MA 02109
(617) 227-0548

BRIAN DAVID GROSINGER
Counsel of Record
ASSISTANT STATE'S ATTORNEY
Morton County Courthouse
210 Second Avenue NW
Mandan, North Dakota 58554
(701) 667-3350
brian.grosinger@mortonnd.org

MICHAEL PARK
CONSOVOY MCCARTHY PARK PLLC
GEORGE MASON UNIVERSITY
SCHOOL OF LAW SUPREME
COURT CLINIC
3 Columbus Circle, 15th Floor
New York, NY 10019
(212) 247-8006

Counsel for Respondent

March 15, 2016

No. 14-1468

In the Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Dakota

REPLY BRIEF FOR PETITIONER

DAN HERBEL
Herbel Law Firm
The Regency Business Ctr.
3333 East Broadway Ave.
Suite 1205
Bismarck, ND 58501
(701) 323-0123

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

TABLE OF CONTENTS

Table of Authorities ii

A. A State may not criminalize the assertion of a constitutional right. 3

1. Laws that criminalize the assertion of constitutional rights are per se unconstitutional 3

2. North Dakota's law also is invalid if subjected to unconstitutional conditions analysis. 12

B. Criminal test-refusal statutes are less effective than other approaches in combating impaired driving. 14

Conclusion 22

TABLE OF AUTHORITIES

Cases

Branti v. *Finkel*,
445 U.S. 507 (1980) 6, 9

Burns v. *State*,
807 S.W.2d 878 (Tex. App. 1991) 18

Carter v. *Cty. of San Bernardino*,
No. E044840, 2009 WL 1816658
(Cal. Ct. App. June 25, 2009) 18

Connick v. *Myers*,
461 U.S. 138 (1983) 6

Dolan v. *City of Tigard*,
512 U.S. 374 (1994) 9

Frost & Frost Trucking Co. v. *R.R. Comm'n*,
271 U.S. 583 (1926) 9

Garcetti v. *Ceballos*,
547 U.S. 410 (2006) 5, 9

Koontz v. *St. Johns River Water Mgmt. Dist.*,
133 S. Ct. 2586 (2013) 9

Mackey v. *Montrym*,
443 U.S. 1 (1979) 9, 10

McCann v. *State*,
588 A.2d 1100 (Del. 1991) 18

Missouri v. *McNeely*,
133 S. Ct. 1552 (2013) ..... *passim*

Nat'l. Treasury Emp. Union v. *Von Raab*,
489 U.S. 656 (1989) 8

New Jersey v. *Portash*,
440 U.S. 450 (1979) 12

Cases—continued

NFIB v. *Sebelius*,
132 S. Ct. 2566 (2012) 9

Nollan v. *California Coastal Comm'n*,
483 U.S. 825 (1987) 9

People v. *Rossetti*,
179 Cal. Rptr. 3d 148 (Cal. Ct. App. 2014) 18

Perry v. *Sinderman*,
408 U.S. 593 (1972) 6

Pickering v. *Bd. of Educ.*,
391 U.S. 563 (1968) 9

Rust v. *Sullivan*,
500 U.S. 173 (1991) 9

Rutan v. *Republican Party of Illinois*,
497 U.S. 62 (1990) 6, 9

Samson v. *California*,
547 U.S. 843 (2006) 8

Schmerber v. *California*,
384 U.S. 757 (1966) 10

South Dakota v. *Dole*,
483 U.S. 203 (1987) 9, 12

South Dakota v. *Neville*,
459 U.S. 553 (1983) 10

Speiser v. *Randall*,
357 U.S. 513 (1958) 6

State v. *Barth*,
637 N.W.2d 369 (N.D. 2001) 20

State v. *Conlin*,
No. A14-0069, 2014 WL 7011171
(Minn. Ct. App. Dec. 15, 2014) 20

Cases—continued

State v. *Krause*,
484 N.W.2d 347 (Wis. Ct. App. 1992) 18

State v. *Lanier*,
452 N.W.2d 144 (S.D. 1990) 18

State v. *Mason*,
No. 02C-01-9310-CC-00233, 1996 WL
111200 (Tenn. Crim. App. Mar. 14, 1996) 18

State v. *Ravotto*,
777 A.2d 301 (N.J. 2001) 18

State v. *Worthington*,
65 P.3d 211 (Idaho Ct. App. 2002) 18

Stephenson v. *Binford*,
287 U.S. 251 (1932) 9

Thai Ngoc Nguyen v. *State*,
292 S.W.3d 671 (Tex. Crim. App. 2009) 18

United States v. *Bullock*,
71 F.3d 171 (5th Cir. 1995) 18

Vernonia Sch. Dist. 47J v. *Acton*,
515 U.S. 646 (1995) 8

Wyman v. *James*,
400 U.S. 309 (1971) 5, 8

Statutes

Minn. Stat. Ann. § 609.50 20

N.D. Cent. Code

§ 12.1-08-02 20

§ 12.1-32-01(5) 12

§ 39-06.1-10 21

§ 39-20-04.1 21

Miscellaneous Sources

Bruce Henderson, *NC Hog Farm Neighbors Seek Court Help To Stop the Stink*, Charlotte Observer (Jan. 1, 2015), perma.cc/94UD-XLYZ 19

Department of Transportation 16 (2015), perma.cc/9KDJ-RTP3 ..... 16, 17

Governors Highway Safety Ass'n, *Drunk Driving Laws*, (Mar. 2016), perma.cc/GC9R-M6QD 21

Nat'l Highway Traffic Safety Admin., Countermeasures that Work: *A Highway Safety Countermeasures Guide for State Highway Safety Offices*, DOT HS 811 727 (7th ed. 2013), perma.cc/C5N3-LQJ6 20

Nat'l Highway Traffic Safety Admin., *Traffic Safety Facts, Breath Test Refusals and Their Effect on DWI Prosecutions*, DOT HS 811 551, at i (2012), perma.cc/LN5Q-K85Z 15

NHTSA, *Use of Warrants to Reduce Breath Test Refusals: Experiences from North Carolina* vi (2011) 18, 19

NHTSA, *Use of Warrants for Breath Test Refusal: Case Studies* (2007) 17

Safety Division, *Annual Report: Fiscal Year 2015*, N.D. Department of Transportation (2015), perma.cc/9KDJ-RTP3 16

REPLY BRIEF FOR PETITIONER

The briefs filed by respondents and the United States reveal some degree of agreement between the parties. The United States and North Dakota evidently recognize that, absent "implied consent," the Fourth Amendment precludes a State from requiring a driver to submit to a blood test in the absence of a warrant. For the reasons we explained in our opening briefs, we agree. And we assume that the United States and North Dakota also would acknowledge that, if the Fourth Amendment does not permit a State to physically force a driver to submit to an unwarranted search, the Constitution makes it impermissible for the State to *criminalize* the driver's refusal to submit to the search—that is, to make it a crime for a person to assert his or her right to resist an unconstitutional search.[1]

Accordingly, the dispositive question here is whether a State may insist on the implied surrender of a constitutional right in return for a state-provided benefit—and whether it may impose *criminal* penalties on the subsequent assertion of that right by the recipient of the benefit. The United States and North Dakota answer that question by asserting that a State may *deem* individuals to have irrevocably surrendered

---

[1] Although North Dakota acknowledges that "a chemical test is a search under the Fourth Amendment and, accordingly, may not be taken without a warrant unless an exception to that requirement applies," it labels that principle "irrelevant" here because "[n]o search occurred." N.D. Br. 19, 20. This peculiar argument, which is not endorsed by the United States, is plainly wrong. Attaching a criminal punishment to the exercise of a constitutional right violates that right, as the Court clearly held in *Camara*, *See*, and *Patel*.

their constitutional rights in return for a state benefit (here, permission to drive) and may enforce that required surrender of constitutional rights through the imposition of criminal penalties, so long as doing so is "reasonable" or satisfies some sort of vague balancing test—even if, as in this case, the defendant was *unaware* that his receipt of the benefit surrendered the constitutional right. But as this Court held in *Patel* and *Camara*, that is simply wrong. The Court has never endorsed rules that make the assertion of constitutional rights illegal, and doing so now would work a radical and dangerous expansion of state authority.

In fact, the governing principle is straightforward and long-settled. When the government imposes criminal sanctions on behavior (here, petitioner's refusal to permit a search), the question is whether the government's act is consistent with the applicable substantive constitutional rule (here, the general prohibition on searches absent a warrant). If it is not, imposition of the criminal sanctions is unconstitutional. When the government instead seeks simply to withdraw or withhold a benefit that it had no obligation to provide because the recipient failed to satisfy a state-imposed condition on receipt of the benefit, the very different question presented is whether enforcement of the condition impermissibly burdens a constitutional right. In no event, however, may the government attach criminal penalties to conduct that is protected by the Constitution.

A. A State may not criminalize the assertion of a constitutional right.

1. Laws that criminalize the assertion of constitutional rights are per se unconstitutional.

a. The question whether a State may require or prohibit specific private conduct on pain of criminal penalties (*e.g.*, may require submission to a search, suppress speech, demand the surrender of property without payment of just compensation) has always been understood to turn on whether the relevant provision of the Constitution permits the State to engage in those acts as a substantive matter. If the government may not engage in those acts consistent with the Constitution, imposing penalties on persons who refuse to allow the government to do what it wants to do (or who themselves refuse to do what the government demands that they do) is facially unconstitutional. The government may not put persons in prison for refusing to hand over their property without just compensation; for saying disagreeable things about the President; or for resisting an unwarranted search in circumstances where the Fourth Amendment requires a warrant.

Although that proposition would seem so fundamental as not to require proof, it is in fact the holding of *Patel*, *Camara*, and *See*. As we showed in our opening *Birchfield* brief (at 30-32), in each of those cases the State sought to impose criminal penalties as punishment for refusal to submit to a search; in each, the Court looked to the substance of the Fourth Amendment to determine whether the proposed search was permissible; and in each the Court, upon finding the search inconsistent with the Fourth Amendment, held the imposition of criminal penalties for search refusal to be unconstitutional.

The efforts of North Dakota and the United States to distinguish these decisions are mystifying. North Dakota asserts that *Patel* and *Camara* "by their terms[] do not apply here because [petitioner] was not searched." N.D. Br. 37. But the whole point of the holdings in *Patel* and *Camara* is that the defendants in those cases *also* were not searched; just like petitioner here, they instead faced punishment because they *resisted* unconstitutional searches.

As for the United States, it maintains that *Patel* and *Camara* are inapposite because "[n]either case suggested that the inspection schemes at issue were constitutionally valid, but could be enforced only through civil means." U.S. Br. 25 n.4. But that observation surely is wrong; although the Court held in *Patel* that criminal inspection-refusal penalties were unconstitutional, there is no reason to doubt that hoteliers in Los Angeles could lose their licenses for refusing to comply with the inspection requirements (that is, by enforcement "through civil means"). The government's submission also is beside the point. The Court held in *Patel* that business owners simply may not "reasonably be put to this kind of choice" between submitting to an unconstitutional search and facing criminal punishment (135 S. Ct. at 2452)—the very choice facing petitioner here.

That principle governs in this case. For reasons we explained in some detail in our opening *Birchfield* brief (at 12-20), a compelled search without a warrant in the circumstances of this case would be unconstitutional. The United States nevertheless suggests that searches conducted as an element of an "implied-consent obligation[]" are "reasonable under the Fourth Amendment." U.S. Br. 21. This contention is baseless; the government makes no effort to demonstrate that a warrant-

less search in these circumstances comports with the usual Fourth Amendment standards, and it is tellingly unable to cite a single Fourth Amendment decision upholding imposition of criminal penalties in such a case. In fact, the government's contention is inconsistent with the entire tenor of this Court's Fourth Amendment doctrine and flatly irreconcilable with the holding of *McNeely*.

b. The United States and North Dakota cannot escape the per se rule that it is unconstitutional to criminalize the exercise of a constitutional right through the slight-of-hand of conditioning receipt of a government benefit on waiver of a constitutional right, and then criminalizing failure to satisfy that condition.

Of course, the State may, in some circumstances, attach a condition to the award of a benefit; it may be able to require that, if individuals seek a particular benefit from the State, they must abide by the associated conditions, even (sometimes) if those conditions bear to some degree on the exercise of a constitutional right. This sort of exchange is the focus of the Court's unconstitutional conditions decisions. Under those holdings, a State may, for example, permissibly condition government financial aid on the recipient's allowance of home visits by welfare officials, or condition state employment on the employee refraining from certain forms of disruptive speech. See, *e.g.*, *Wyman* v. *James*, 400 U.S. 309 (1971); *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006). But in those cases, the corollary to the exchange is that, if the individual does not satisfy the condition, he or she simply does not get (or loses) the benefit. That is the extent of the State's power; the Court has never said that a State may go further and attach an affirmative penalty—let alone a criminal penalty—to failure to satisfy the State's condition.

That limitation on state authority is inherent in the nature of the unconstitutional conditions doctrine. Although the government may have no obligation to provide particular benefits, the Court has held that the government may not attach a condition to the award of benefits that would effectively "coerce" surrender of a constitutional right. *Branti* v. *Finkel*, 445 U.S. 507, 513 (1980). As we show in the opening *Birchfield* brief (at 33-34), the Court's consistent concern in these cases has been that the State's manipulation of benefits and conditions in this manner would effectively "allow the government to 'produce a result which [it] could not command directly.'" *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972) (quoting *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958)). See, *e.g.*, *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 72 (1990). Accordingly, the unconstitutional conditions cases are ones where the Court is trying to determine whether the State seeks to do indirectly (by attaching a condition to the award of a benefit) something the Constitution prohibits it from doing by fiat.

In this case, there is no need to go though that analysis to determine whether the State is trying to achieve a forbidden goal by indirection. Here, the government is *directly* doing the forbidden thing, not by taking away something it did not have to give in the first place (as in, for example, the public employment or welfare examples), but by expressly criminalizing the exercise of a constitutional right. It would be just as though the State provided that public employees who spoke in a disapproved manner on matters of private concern not only could lose their government jobs (see, *e.g.*, *Connick* v. *Myers*, 461 U.S. 138 (1983)), but could be put in prison for speaking in a manner inconsistent with the State's employment condition. There can be no serious contention that imposition of

such a criminal punishment on speech would be constitutional.

The United States seeks to circumvent this principle by contending that, if the government may require drivers to submit to blood tests as a condition on their ability to drive, it may use criminal penalties to "enforce" that requirement. U.S. Br. 16-17. But at least in the circumstances of this case, that argument is a transparent form of bootstrapping. There is no suggestion here that, when petitioner got behind the wheel, he actually consented to—or even was aware of—the condition attached by the State to his ability to drive. That is why the United States and North Dakota characterize the challenged statutes as "*implied*-consent rules." U.S. Br. 16 (emphasis added). The United States' contention therefore is that, although the Fourth Amendment prohibits the unwarranted blood testing of drivers as a general matter, the State may effectively read that substantive constitutional limit on state authority off the books by purporting to criminally punish, not the exercise of Fourth Amendment rights as such, but the failure to abide by the driver's "implied consent" to be tested. That theory, if accepted, would be a formula for the destruction of constitutional guarantees.

c. None of the decisions relied upon by the United States and North Dakota supports their contention that a State may criminalize the assertion of a constitutional right, in circumstances where the State has purported to make surrender of that right a condition on the award of a benefit. Insofar as they are relevant here at all, each of the cited decisions falls into one of two categories: (a) it addresses the substantive scope of the Fourth Amendment; or (b) it addresses the circumstances in which the government may withhold

or withdraw benefits for failure to satisfy the State's condition. None suggests that a State may affirmatively punish assertion of a constitutional right in any circumstance.

First, the United States maintains that the Court has "upheld search-related conditions on persons who receive particular benefits when the conditions were supported by a balancing of interests." U.S. Br. 21. But none of the cited decisions involved the validity of a "condition"; each addressed the substantive scope of the Fourth Amendment, considering whether a proposed search could validly be executed. It was in this context that the Court engaged in an inquiry into "reasonableness," as it does in all Fourth Amendment cases. See *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 653-54 (1995) (search permissible under special needs exception to warrant requirement); *Nat'l. Treasury Emp. Union* v. *Von Raab*, 489 U.S. 656, 666 (1989) (same); *Samson* v. *California*, 547 U.S. 843, 847 (2006) (search permissible given parolee's limited expectation of privacy); see also *Wyman*, 400 U.S. at 386 ("we are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term" because there was no "search in the traditional criminal law context"). And here, it is undisputed that ordinary Fourth Amendment principles preclude a search in the absence of a warrant.

Second, the remaining decisions cited by the United States and North Dakota are unconstitutional conditions cases of the conventional sort. These addressed whether conditions that bore in some respect on the exercise of constitutional rights could be attached to the award or withdrawal of government benefits of various sorts (public employment, grants, subsidies,

land use permits). In some of these cases the Court upheld the condition; in others it found the condition invalid because the requirement had the practical effect of impeding the exercise of a constitutional right. But in *no* case did the State purport to attach an independent penalty beyond denial of a benefit that the State was under no obligation to provide—let alone a criminal penalty—to the recipient's failure to satisfy a condition.[2]

That is true, as well, of the driving cases on which the United States places principal reliance. U.S. Br. 18-20. In *NcNeely*, the Court noted implied-consent laws that "impose significant consequences when a motorist withdraws consent," among them that "the motorist's driver's license is immediately suspended or revoked." 133 S. Ct. at 1566. That penalty is limited to the revocation of a benefit; it does not purport to attach a criminal penalty to the exercise of a constitutional right. Similarly, in *Mackey* v. *Montrym*, 443 U.S. 1 (1979), the Court rejected a due process challenge to a state law that summarily suspended the licenses of

---

[2] This was so in public employment First Amendment cases, see *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006); *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 63 (1990); *Branti v. Frankel*, 445 U.S. 507, 518 (1980); *Pickering* v. *Bd. of Educ.*, 391 U.S. 563 (1968); in Fifth Amendment takings cases, see *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013); *Dolan* v. *City of Tigard*, 512 U.S. 374, 377 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987); in funding cases, see *Rust* v. *Sullivan*, 500 U.S. 173, 178, 196 (1991); in federalism-related cases, see *Nat'l Fed'n of Indep. Businesses* v. *Sebelius*, 132 S. Ct. 2566, 2608 (2012); *South Dakota* v. *Dole*, 483 U.S. 203, 211 (1987); and in cases implicating public roads, see *Stephenson* v. *Binford*, 287 U.S. 251, 260 (1932); *Frost & Frost Trucking Co.* v. *R.R. Comm'n*, 271 U.S. 583, 593 (1926).

drivers who refused a chemical test; that law, too, was limited to license suspension and did not impose affirmative penalties for test refusal. See *id.* at 3-4.

Third, the only decision relied upon by the United States and North Dakota that does not fall into one of these categories is *South Dakota* v. *Neville*, 459 U.S. 553 (1983), which held that the *Fifth* Amendment did not preclude a State from using a motorist's test refusal against him in a subsequent DUI prosecution. U.S. Br. 17-18; N.D. Br. 23-24. See also *McNeely*, 133 S. Ct. at 1566 (noting such state statutes and *Neville*'s holding that allowing use of an adverse inference from test refusal "does not violate the Fifth Amendment"). But as we showed in our opening *Birchfield* brief (at 23-24, 40 n.11), *Neville* has no application here at all.

As the Court held in *Schmerber* v. *California*, 384 U.S. 757, 762 (1966), the Fifth Amendment does not prohibit a State from "forc[ing] a person suspected of driving while intoxicated to submit to a blood alcohol test." *Neville*, 459 U.S. at 559. That being so, "the values behind the Fifth Amendment are not hindered when the State offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him." *Id.* at 563. *Neville* therefore was not an unconstitutional conditions case, not one where the State criminalized (or otherwise penalized) the assertion of a constitutional right, and not one "where the State ha[d] subtly coerced [the defendant] into choosing the option it had no right to compel, rather than offering a true choice." *Id.* at 563-564. *Neville* accordingly provides no support for the position of the United States and North Dakota here. Although we made this point in our opening brief, the United States and North Dakota offer no response.

d. Applying this framework to our case, if the government withdraws a benefit because the recipient refused to allow a search—*i.e.*, suspends a driver's license—the issue is one of unconstitutional conditions, as to which it would be appropriate to apply the usual unconstitutional conditions inquiry, perhaps including an examination into nexus and proportionality. See *Birchfield* Opening Br. 33-40. But when, as here, the government seeks to enforce its desire to search by means of the criminal law, there is no issue of withdrawal of a benefit, and the case is governed by the substantive Fourth Amendment inquiry: whether, in the circumstances, the State may compel a warrantless search by force or by threatening a criminal sanction. The answer to that question turns on whether the State had a right to search under the Fourth Amendment without a warrant in the first place, not on application of an unconstitutional conditions balancing test. And as we have explained, North Dakota and the United States essentially concede that—barring application of a special "implied-consent" rule—a warrantless search is not permissible in the circumstances of this case. That should be the end of the matter.

But there is more. It bears emphasis that the contrary rule advanced by the United States and North Dakota has extraordinary implications. It would allow the government to attach criminal penalties to an individual's exercise of a constitutional right that is inconsistent with conditions attached to workaday benefits offered by the government—even when, as in this case, there is no showing that the individual was aware of either the condition or the penalty. As a consequence, the State's contention here, if accepted, would fundamentally alter the unconstitutional conditions doctrine, for the first time using that doctrine to undercut, rather than protect, the constitutional

right at issue. The Court should resist the invitation to take that step.

2. North Dakota's law also is invalid if subjected to unconstitutional conditions analysis.

a. In addition, even if it is not per se unconstitutional for a State to attach criminal penalties to the assertion of a constitutional right in the circumstances of this case, the penalties applied here would violate the unconstitutional conditions doctrine. As we explained in our opening brief, denial of the ability to drive is itself coercive, and even if that were not so, adding the threat of criminal penalties is "the essence of coerc[ion]." *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979). This combination of penalties reaches the point where "pressure turns into compulsion" within the meaning of the unconstitutional conditions doctrine. *South Dakota* v. *Dole*, 483 U.S. 203, 211 (1987). See *Birchfield* Opening Br. 35-36.

In contending to the contrary, North Dakota minimizes the magnitude of the compelled-consent criminal penalty, maintaining that most test-refusal convictions are misdemeanors. N.D. Br. 54. But test refusal may be a felony; the petitioner in *Bernard* faces a minimum of three and a maximum of seven years in prison, as well as a fine of up to $14,000. See *Bernard* Opening Br. 7. And misdemeanor penalties in North Dakota may themselves be severe, including up to a year in prison, fines of up $3000 (N.D. Cent. Code § 12.1-32-01(5)), and a possible range serious collateral consequences, including in some circumstances ineligibility for virtually any profession requiring a license (see, *e.g.*, § 15.1-13-25 (teacher), § 27-11-03.1 (lawyer)) or to adopt a child (§ 50-12-03.2). This takes coercion to a level far removed from that present in the run of civil unconstitutional conditions cases.

For its part, the United States maintains that, once it is agreed that a condition is valid, a State may use any mechanism it wants to enforce the condition; here, the United States continues, the condition is submission to a search. U.S. Br. 25. But even assuming that the relevant "condition" in this case is simply agreeing to be searched, the government assumes its conclusion in asserting that *any* enforcement mechanism is acceptable.

In fact, there is no decision of this Court so holding, because there is no other case addressing laws in which States have used criminal penalties to enforce implied-consent conditions on the award of state benefits. Accordingly, the Court has never had occasion to say that criminal penalties may be used to enforce such a condition (in fact, we believe that it has said in *Patel*, *Camara*, and *See* that they may *not* be so used). The government's argument that States may use criminal penalties to enforce conditions on the award of benefits therefore is trying to expand the government's (occasional authority to withdraw a benefit into the very different power to override constitutional guarantees. For the reasons we already have explained, such an approach is impermissible. See page 7, *supra*.

b. Moreover, the United States also is wrong in the second part of its syllogism: the relevant "condition" in this case is not limited to surrender of the right to resist a search, but also must be understood to include exposure to criminal penalties for refusal to surrender the right. The State ordinarily does not have the authority to impose criminal penalties for the exercise of a constitutional right. If the State ever may apply such penalties to failure to satisfy a condition, that is only because exposure to the criminal penalty is part of the condition to which the recipient subjected him- or

herself in return for receiving the relevant benefit from the State. That means the criminal penalty must be understood to be *part of the condition* for purposes of the unconstitutional conditions analysis.

And for reasons we state in our opening brief (at 38-39), there is only an attenuated nexus, and no proportionality, between the condition of submission to criminal test-refusal penalties and the benefit of being permitted to drive. The government's response is that criminal test-refusal penalties are effective at addressing impaired driving and that alternative approaches are not. But we showed in our opening brief (at 40-46), and demonstrate further below (at 14-21), that the government's assertion on these points is incorrect.

B. Criminal test-refusal statutes are less effective than other approaches in combating impaired driving.

The United States and North Dakota devote much attention to describing the magnitude of the Nation's impaired driving problem and contending that criminal compelled-consent laws are a necessary response to that problem. See U.S. Br. 2-9, 26-31; N.D. Br. 1-10, 39-48. We agree with the first element of this presentation; there is no denying that impaired driving is enormously destructive, and that States must be permitted to develop and implement effective responses to that problem. But we take issue with their proposed solution. In fact, criminal compelled-consent statutes are not effective at obtaining BAC evidence. And numerous other constitutional methods that are readily available to the state and federal governments—including, notably, the use of search warrants—are much *more* effective in combating impaired driving.

1. To begin with, criminal refusal statutes are not the panacea suggested by the United Stats and North Dakota. On the face of it, such statutes hardly could be indispensable tools in the fight against drunk driving; after all, a very substantial majority of the States have declined to enact criminal test-refusal statutes of the sort at issue here. On examination, it is not hard to see why that is so. For all the United States has to say in its brief about the inadequacy of "purely administrative sanctions" and the need for BAC evidence (U.S. Br. 26), its presentation, and that of North Dakota, is notably lacking in *any* evidence that criminal test-refusal statutes actually lead to a material increase in either BAC testing or DUI/DWI convictions. In fact, they do not.

To begin with, as we showed in our opening brief, a NHTSA review found that the available data "did not indicate a clear relationship between refusing a BAC test and the probability of conviction for DWI/DUI." Nat'l Highway Traffic Safety Admin., *Traffic Safety Facts, Breath Test Refusals and Their Effect on DWI Prosecutions*, DOT HS 811 551, at i (2012), perma.cc/-LN5Q-K85Z. The United States makes no response.[3]

As for criminal test-refusal statutes in particular, the *amicus* brief submitted by the National College for DUI Defense (NCDD) and NACDL demonstrates in

---

[3] North Dakota points to a study finding that sites "with the highest conviction rates" had criminalized refusal. N.D. Br. 45. But the cited study "re-define[d] a conviction of DWI as a criminal conviction of impaired driving *or as a conviction of test refusal*, or both." NHTSA, *Traffic Safety Facts, Breath Test Refusals and Their Effect on DWI Prosecutions* 15 (2012) (emphasis added). Although test refusal statutes surely lead to more convictions *for test refusal*, the study does not show that such statutes lead to more DUI/DWI convictions.

some detail that there is no substantial correlation between test refusal rates and criminalization of test refusal; to offer just one example, Florida, the State with the third highest refusal rate in the Nation, has a criminal test refusal statute. See NCDD Br. 3-6.

In this regard, North Dakota's description of its experience is particularly misleading. It suggests that the enactment of "Brielle's law" led to a dramatic decline in the number of crashes resulting in fatalities that were alcohol related, from 51% in 2012 to 41% in 2015, "the lowest rate in more than a decade." N.D. Br. 9-10. In fact, the alcohol-related death rate had been lower in some years prior to the enactment of Brielle's law (it was 40% in 2009), and was lower in 2005 (45.5%), 2006 (42.3%), and 2009 than in 2014 (46.7%), the year after enactment of the law. Safety Division, *Annual Report: Fiscal Year 2015*, N.D. Department of Transportation 16 (2015), perma.cc/9KDJ-RTP3. In addition, to the extent that the law did have a positive effect, there is no reason to attribute that result to the criminalization of test refusal rather than to the numerous other provisions included in the legislation.

2. In contrast to the questionable value of criminal test-refusal statutes, there is substantial evidence that pursuing search warrants is effective in obtaining both BAC evidence and DUI/DWI convictions.

First, as we showed in our opening brief (at 42-44), and as *amici* NCDD and NACDL demonstrate in detail (at Br. 6-18), in the vast majority of jurisdictions police officers may obtain such warrants remotely and quickly in DUI cases. Although the United States refers vaguely to the "delay" occasioned by seeking a warrant (U.S. Br. 28), neither it nor North Dakota denies that the modern procedures described by this

Court in *McNeely* (see 133 S. Ct. at 1562) make warrants easily available to officers in a timely fashion.

Second, warrants are very effective in obtaining BAC evidence—probably much more so than are criminal compelled-consent statutes.

One of the most extensive studies of the issue analyzed the experience of four states (Arizona, Michigan, Oregon, and Utah) that require warrants before DUI/DWI blood tests in some or all of their jurisdictions. NHTSA, *Use of Warrants for Breath Test Refusal: Case Studies* (2007). As it found:

> Judges and prosecutors interviewed strongly supported warrants, to the extent of volunteering to answer the telephone in the middle of the night to issue a warrant. They agreed that warrants have reduced breath test refusals and increased the proportion of DWI cases with BAC evidence in their jurisdictions. This in turn has produced more guilty pleas, fewer trials, and more convictions.

Id. at vi. A Phoenix police officer quoted in the survey "estimated that refusals dropped from about 30 to 40% before warrants were used to 5% or less afterwards." *Id.* at 10. Thus, as the plurality noted in *McNeely*, "field studies in States that permit nonconsensual blood testing pursuant to a warrant have suggested that, although warrants do impose administrative burdens, their use can reduce breath-test-refusal rates and improve law enforcement's ability to recover BAC evidence." *McNeely*, 133 S. Ct. at 1567 (plurality opinion).

Third, the findings that issuance of warrants greatly reduces test refusals belies the argument that reliance on warrants often will require forcible blood

draws that produce violent confrontations between suspects and law enforcement personnel. See U.S. Br. 28-29; N.D. Br. 29.[4] To the contrary, a controlled experiment by NHTSA that compared counties in North Carolina requiring warrants in the vast majority of cases with counties that did not found that, in the counties that required warrants, "fewer cases were pled down to lesser charges; defendants more often pled guilty; more DWI convictions were obtained; fewer cases went to trial; more cases were disposed; and [officers] believed that court time was reduced." NHTSA, *Use of Warrants to Reduce Breath Test Refusals: Experiences from North Carolina* vi (2011). In

---

[4] The United States' assertion that "[e]xperience demonstrates that the risk of such confrontations is far from theoretical" (U.S. Br. 28) is quite misleading. In fact, *none* of the ten decisions cited in support of that contention involved a DUI/DWI case in which a warrant had been obtained. Nine involved *warrantless* blood draws and therefore are wholly inapposite here. See *People* v. *Rossetti*, 179 Cal. Rptr. 3d 148, 150 (Cal. Ct. App. 2014); *Carter* v. *Cty. of San Bernardino*, No. E044840, 2009 WL 1816658, at *2 (Cal. Ct. App. June 25, 2009); *McCann* v. *State*, 588 A.2d 1100, 1101 (Del. 1991); *State* v. *Worthington*, 65 P.3d 211, 213 (Idaho Ct. App. 2002); *State* v. *Ravotto*, 777 A.2d 301, 304 (N.J. 2001); *State* v. *Lanier*, 452 N.W.2d 144, 145 (S.D. 1990), abrogated by *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1556 (2013); *State* v. *Mason*, No. 02C-01-9310-CC-00233, 1996 WL 111200, at *8 (Tenn. Crim. App. Mar. 14, 1996); *Burns* v. *State*, 807 S.W.2d 878, 880 (Tex. App. 1991), abrogated by *Thai Ngoc Nguyen* v. *State*, 292 S.W.3d 671 (Tex. Crim. App. 2009); *State* v. *Krause*, 484 N.W.2d 347, 349 (Wis. Ct. App. 1992). The tenth, and the only case where law enforcement personnel received a warrant, involved an armed robbery suspect who was not intoxicated. *United States* v. *Bullock*, 71 F.3d 171, 174 (5th Cir. 1995).

all, police officers stated that "obtaining warrants for blood was a valuable tool for collecting evidence." *Ibid.*[5]

These findings also call into doubt North Dakota's contention that use of warrants poses a "particularly grave risk of danger to law enforcement officers in rural parts of North Dakota." N.D. Br. 29. The North Carolina test program was effective even in sparsely populated areas like Duplin County.[6] Although law enforcement personnel in Duplin County occasionally had "arguments" with suspects over the use warrants, as did "their counterparts in other counties," "[t]here were no reports from the sheriff's office, highway patrol, or phlebotomy staff of combative suspects or safety issues." NHTSA, *Use of Warrants to Reduce Breath Test Refusals: Experiences from North Carolina* 15 (2011). Overall, "[t]he refusal rate for the experimental counties was 18% in 2004, dropping to 12% by 2006. During the same time, the refusal rate for the comparison counties rose from 19% to 20%." *Id.* at vii.

Fourth, insofar as enforcing a warrant nevertheless is thought to require the use of force or otherwise to be problematic, States could impose criminal *warrant*-refusal penalties, just as they now impose criminal *test*-refusal penalties. Such prosecutions appear possible in both North Dakota and Minnesota under

---

[5] The United States refers to this study in describing the slight additional time required to issue a warrant, but fails to mention the finding that that police officers found the warrant process worthwhile. U.S. Br. 9.

[6] Duplin County has been described as "an expanse of bare fields in winter, small towns, and more fields." Bruce Henderson, *NC Hog Farm Neighbors Seek Court Help To Stop the Stink*, Charlotte Observer (Jan. 1, 2015), perma.cc/94UD-XLYZ.

existing law.[7] Such an approach would achieve all the benefits that the United States and North Dakota perceive in the current criminal test-refusal regime—but would lack the constitutional infirmity.

3. In addition, as we showed in our opening brief (at 44-46), North Dakota underutilizes other available alternative approaches that comport with the Constitution and that are demonstrably effective. The only real response to this showing that is offered by the United States and North Dakota is the assertion that many of the alternative strategies "depend on BAC evidence for appropriate implementation." U.S. Br. 30. In fact, even apart from the reality that criminal test-refusal penalties often do not themselves produce BAC evidence, most of the available approaches do *not* require BAC evidence, including the first ten on the NHTSA chart: (1) high-visibility sobriety checkpoints; (2) alcohol problem assessment and treatment; (3) alcohol interlocks; (4) alcohol screening and intervention; (5) minimum drinking-age laws; (6) high-visibility saturation patrols; (7) passive alcohol sensors; (8) DWI courts; (9) limits on diversion and plea agreements; and (10) DWI offender monitoring. Nat'l Highway Traffic Safety Admin., *Countermeasures that Work: A Highway Safety Countermeasures Guide for*

---

[7] See Minn. Stat. Ann. § 609.50 (obstruction of legal process); N.D. Cent. Code § 12.1-08-02 (resistance to the discharge of official duties); see also *State* v. *Conlin*, No. A14-0069, 2014 WL 7011171, at *1 (Minn. Ct. App. Dec. 15, 2014); *State* v. *Barth*, 637 N.W.2d 369, 375 (N.D. 2001).

State Highway Safety Offices, DOT HS 811 727 at 1-7 through 1-8 (7th ed. 2013), perma.cc/C5N3-LQJ6.[8]

Moreover, North Dakota does not fully enforce DUI laws already on the books, a point noted during the debate on its current statute. See Legislative History of H.B. 1302 at 10, perma.cc/3P8Z-TAPN. Enforcing those laws, pursuing additional approaches such as passive alcohol sensors—described by the North Dakota Attorney General's Office during the debate as producing "fast, reliable, accurate results" (*id.* at 302)—and addressing North Dakota's problematic culture of binge drinking (also frequently referenced in the debate on the State's law), offer the State a variety of mechanisms with which to combat impaired driving.

In saying this, we of course do not mean to suggest that States "are required to select a single strategy" to address impaired driving. U.S. Br. 30. We contend, instead, that States may *not* select the single strategy that is flatly inconsistent with the requirements of the Fourth Amendment. Because that is what North Dakota has done, the decision below upholding the State's criminal compelled-consent law should be set aside.

---

[8] North Dakota asserts that petitioner "incorrectly faults North Dakota for providing enhanced penalties only to those offenders with a BAC of 0.18% or higher, rather than 0.16%." N.D. Br. 46. In fact, full DWI penalties—such as license suspension—are applicable only at 0.18%. See N.D. Cent. Code § 39-06.1-10; N.D. Cent. Code § 39-20-04.1. For this reason, the Governors Highway Safety Association classifies North Dakota's "Inc[reased] Penalty for High BAC" as beginning at "0.18." Governors Highway Safety Ass'n, *Drunk Driving Laws*, (Mar. 2016), perma.cc/GC9R-M6QD.

CONCLUSION

The decision of the North Dakota Supreme Court should be reversed.

Respectfully submitted.

DAN HERBEL
Herbel Law Firm
The Regency Business Ctr.
3333 East Broadway Ave., Suite 1205
Bismarck, ND 58501
(701) 323-0123

EUGENE R. FIDELL
Yale Law School
*Supreme Court Clinic**
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3147
crothfeld@mayerbrown.com

Counsel for Petitioner

APRIL 2016

---

* The representation of petitioner by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

Nos. 14-1468, 14-1470, and 14-1507

In the Supreme Court of the United States

DANNY BIRCHFIELD, PETITIONER

v.

STATE OF NORTH DAKOTA

WILLIAM ROBERT BERNARD, JR., PETITIONER

v.

STATE OF MINNESOTA

STEVE MICHAEL BEYLUND, PETITIONER

v.

GRANT LEVI, DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF NORTH DAKOTA AND MINNESOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General
THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The United States will address the following question:

Whether a State that requires a driver to consent to a chemical test following an arrest for driving while impaired, or based on probable cause that he was driving while impaired, may constitutionally make a driver's refusal to comply with that condition a criminal offense.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 12
Argument:
States may make refusal to comply with a valid chemical-testing requirement a criminal offense 15
A. States may enforce valid implied-consent rules through criminal sanctions 16
1. This Court has properly recognized implied-consent obligations as valid 17
2. Birchfield's attacks on implied-consent obligations lack merit 21
3. Principles of "proportionality" do not forbid use of criminal penalties to enforce implied-consent requirements 24
B. States may impose criminal penalties for refusal to take a breath test when probable cause of intoxication is established, regardless of the validity of implied-consent provisions generally 31
Conclusion 36

TABLE OF AUTHORITIES

Cases:

Burns v. *State*, 807 S.W.2d 878 (Tex. Ct. App. 1991), abrogated by *Nguyen* v. *State*, 292 S.W.3d 671 (Tex. Crim. App. 2009) 29
Camara v. *Municipal Court*, 387 U.S. 523 (1967) 25
Carter v. *County of San Bernadino*, No. EO44840, 2009 WL 1816658 (Cal. Ct. App. June 25, 2009) 28
Connick v. *Myers*, 461 U.S. 138 (1983) 23
Dolan v. *City of Tigard*, 512 U.S. 374 (1994) 22, 23
Draper v. *United States*, 358 U.S. 307 (1959) 4

Cases—Continued: Page

Frost & Frost Trucking Co. v. *Railway Comm'n*, 271 U.S. 583 (1926) 22
Hess v. *Pawloski*, 274 U.S. 352 (1927) 24
Illinois v. *McArthur*, 531 U.S. 326 (2001) 32
Koontz v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) 23
Los Angeles v. *Patel*, 135 S. Ct. 2443 (2015) 25
Mackey v. *Montrym*, 443 U.S. 1 (1979) 19, 20, 34
Maryland v. *King*, 133 S. Ct. 1958 (2013) 31, 34, 35
McCann v. *State*, 588 A.2d 1100 (Del. 1991) 29
Michigan v. *Summers*, 452 U.S. 692 (1981) 32
Michigan Dep't of State Police v. *Sitz*, 496 U.S. 444 (1990) 30, 33
Missouri v. *McNeely*, 133 S. Ct. 1552 (2013) ..... *passim*
National Treasury Emps. Union v. *Von Raab*, 489 U.S. 656 (1989) 21
New Jersey v. *I.L.O.*, 469 U.S. 325 (1985) 36
Pennsylvania v. *Labron*, 518 U.S. 938 (1996) 32
People v. *Rossetti*, 179 Cal. Rptr. 3d 148 (Cal. Ct. App. 2014) 29
Perry v. *Sindermann*, 408 U.S. 593 (1972) 22
Pickering v. *Board of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968) 22
Riley v. *California*, 134 S. Ct. 2473 (2014) 32
Samson v. *California*, 547 U.S. 843 (2006) 21
Schmerber v. *California*, 384 U.S. 757 (1966) 19
Skinner v. *Railway Labor Execs. Ass'n*, 489 U.S. 602 (1989) ..... *passim*
South Dakota v. *Dole*, 483 U.S. 203 (1987) 23
South Dakota v. *Neville*, 459 U.S. 553 (1983) ..... *passim*
South Dakota v. *Opperman*, 428 U.S. 364 (1976) 24

Cases—Continued: Page

State v. *Krause*, 484 N.W.2d 347 (Wis. Ct. App. 1992) 29
State v. *Lanier*, 452 N.W.2d 144 (S.D. 1990), abrogated by *McNeely*, 133 S. Ct. 1552 (2013) 29
State v. *Mason*, No. 02C-01-9310-CC-00233, 1996 WL 111200 (Tenn. Crim. App. Mar. 14, 1996) 29
State v. *Ravotto*, 777 A.2d 301(N.J. 2001) 29
State v. *Worthington*, 65 P.3d 211 (Idaho Ct. App. 2002) 29
Stephenson v. *Binford*, 287 U.S. 251(1932) 22, 24
Terry v. *Ohio*, 392 U.S. 1 (1968) 32
United States v. *Bullock*, 71 F.3d 171 (5th Cir. 1995), cert. denied, 517 U.S. 1126 (1996) 28
United States v. *Jacobsen*, 466 U.S. 109 (1984) 34
Vernonia Sch. Dist. 47J v. *Acton*, 515 U.S. 646 (1995) 21
Wyman v. *James*, 400 U.S. 309 (1971) 21
Wyoming v. *Houghton*, 526 U.S. 295 (1998) 32

Constitution, statutes and regulations:

U.S. Const.:
Amend IV ..... *passim*
Amend V 17
Takings Clause 24
18 U.S.C. 3118 ..... 2, 4
Ind. Code. Ann. § 9-30-7-5(a) (LexisNexis Supp. 2015) 9
Me. Rev. Stat. Ann. tit. 29-A, § 2411(5) (West 1996) 9
Md. Code Ann., Transp. § 27-101(x)(3) (LexisNexis Supp. 2015) 9

Statutes and regulations—Continued: Page

Minn. Stat. Ann.:
§ 169.A.51(1)-(2) 4
§ 169A.52(1) 5
N.D. Cent. Code § 39-20-01(3)(a) (Supp. 2015) 10
75 Pa. Cons. Stat. Ann. § 3804(c) (West Supp. 2015) 9
32 C.F.R.:
Section 634.8 2
Section 634.9(a)(3)(i) 2
Section 634.9(b)(3)(i) 2
36 C.F.R.:
Section 1.3(a) 2, 8
Section 4.23(c) 2, 4, 8

Miscellaneous:

1 *Apprehending and Prosecuting the Drunk Driver* (LexisNexis 2015):
§ 7.02 6
§ 7.04 5
2 *Defense of Drunk Driving Cases* § 18.01 (LexisNexis 2015) 6
Dep't of Transp. Nat'l Highway Traffic Safety Admin.:
2014 Alcohol-Impaired Driving Traffic Safety Fact Sheet (2015) 2, 3
Breath Test Refusal Rates in the United States—2011 Update (2014) 7, 26
Countermeasures That Work: A Highway Safety Countermeasure Guide for State Highway Safety Offices (8th ed. 2015) 3, 28, 29, 30

Miscellaneous—Continued: Page

Digest of Impaired Driving and Selected Beverage Control Laws (28th ed. 2015) 3, 4
Evaluation of Enhanced Sanctions for Higher BACs: Summary of States' Laws (2001) 3
Implied Consent Refusal Impact (1991) 7, 8, 26, 27
No Refusal Initiative Facts (2010) 7, 26
Quick Facts 2014 (2016) 2
Refusal of Intoxication Testing: A Report to Congress (2008) 5, 8, 9, 26, 29
Use of Warrants for Breath Test Refusal: Case Studies (2007) 7, 8, 9
Use of Warrants to Reduce Breath Test Refusals: Experiences From North Carolina (2011) 5, 7, 8, 9, 26
Robert L. Donigan, *Chemical Tests and the Law* (1966) 4
Andre A. Moenssens & Fred E. Inbau, *Scientific Evidence in Criminal Cases* (2d ed. 1978) 6
H.L. Ross et al., *Causes and Consequences of Implied Consent Test Refusal*, 11 Alcohol, Drugs and Driving (1995) 8
Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989) 22
Robert B. Voas et al., *Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes*, 40 J. Safety Research 77 (2009) 6

In the Supreme Court of the United States

No. 14-1468

DANNY BIRCHFIELD, PETITIONER

v.

STATE OF NORTH DAKOTA

No. 14-1470

WILLIAM ROBERT BERNARD, JR., PETITIONER

v.

STATE OF MINNESOTA

No. 14-1507

STEVE MICHAEL BEYLUND, PETITIONER

v.

GRANT LEVI, DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF NORTH DAKOTA AND MINNESOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

These cases concern the constitutionality of statutes that condition authorization to drive on state roads on the requirement that a driver consent to a

chemical test for alcohol or drug impairment when arrested for driving while impaired or when there is probable cause of that offense, and that impose criminal penalties on a driver who refuses to comply. The United States conditions authorization to drive on federal lands on the requirement that a driver consent to a chemical test if arrested for driving while impaired, when an officer has reasonable grounds to believe that the driver is impaired. 18 U.S.C. 3118. And in the National Park System, it is a misdemeanor to refuse a chemical test requested by an officer with probable cause to believe that a driver is impaired. 36 C.F.R. 4.23(c); 36 C.F.R. 1.3(a).[1] The Department of Transportation's National Highway Traffic Safety Administration (NHTSA), which conducts research and develops traffic safety programs, endorses chemical-testing requirements and criminal penalties for drivers who refuse to comply.

STATEMENT

1. a. Alcohol-related traffic fatalities are a major cause of death, injury, and economic loss in the United States. Motor-vehicle crashes claim more than 32,000 lives per year, making them the leading cause of death for some groups of Americans, including Americans at every age from 16 to 24. NHTSA, *Quick Facts 2014* 1, 6 (2016).

Nearly a third of the fatal crashes involve drivers who were legally impaired by alcohol. NHTSA, *2014 Alcohol-Impaired Driving Traffic Safety Fact Sheet* 1

---

[1] In addition, permission to drive on military bases is conditioned on consent to a chemical test for alcohol or drugs, if the driver is "lawfully stopped, apprehended, or cited" for an offense while driving on a base. 32 C.F.R. 634.8; see 32 C.F.R. 634.9(a)(3)(i) and (b)(3)(i).

(2015). Moreover, of these, drivers with blood-alcohol concentration (BAC) levels significantly above the legal limit were by far the most likely to be involved in crashes. *Id.* at 5. More than two thirds of alcohol-impaired drivers in fatal crashes have BAC levels of .15 or higher—approximately double the legal limit. *Ibid.*

2. a. States have sought to reduce the toll of impaired driving through increasingly stringent sanctions. All States now make it a crime to operate a motor vehicle with a BAC of .08 or higher. NHTSA, *Digest of Impaired Driving and Selected Beverage Control Laws* v (28th ed. 2015) (*State Law Digest*).

States have also increasingly focused on identifying and treating the high-BAC offenders who pose heightened risks and are particularly likely to be "habitual impaired-driving offenders." NHTSA, *Countermeasures That Work: A Highway Safety Countermeasure Guide for State Highway Safety Offices* 1-15 (8th ed. 2015) (*Countermeasures*). While few States had laws directed at these offenders before 1990, NHTSA, *Evaluation of Enhanced Sanctions for Higher BACs: Summary of States' Laws* 17 (2001) (*Enhanced Sanctions*), every State but one now has a scheme of increased penalties based on BAC level, *Countermeasures* 1-15. Common measures imposed on high-BAC offenders include "mandatory assessment and treatment for alcohol problems, close monitoring or home confinement, installation of an ignition interlock, and vehicle or license plate sanctions." *Ibid.*

b. For approximately half a century, States have sought to identify impaired drivers by conditioning authorization to drive on the requirement that drivers consent to a chemical test under limited

circumstances—while at the same time generally eschewing forcible blood testing. Under an approach first adopted in New York in 1953, and made part of the Uniform Vehicle Code in 1962, authorization to drive within a State is conditioned on the requirement that a driver consent to a chemical test of impairment if arrested on a drunk driving charge. Robert L. Donigan, *Chemical Tests and the Law* 177-179 (1966); *id.* at 311 (Uniform Vehicle Code § 6-205.1(c) (1962)). If a driver refuses to comply, however, no test is given. *Chemical Tests and the Law* 177, 311.

All 50 States now condition the authorization to drive on the requirement that a driver consent to a chemical test under specified circumstances. *State Law Digest* xxv-xxx; 1-492. Thirty-one States, including North Dakota, provide that drivers must consent only if arrested for driving while impaired. See *id.* at 334, 1-492; see also 18 U.S.C. 3118 (provision applicable on federal lands).

The remaining States, including Minnesota, require consent to a chemical test if officers have either "probable cause" or equivalent grounds to believe that the driver is impaired. See *State Law Digest* 230-232, 1-494 (setting out statutes requiring "probable cause," "reasonable grounds" or "reasonable cause"); *Draper* v. *United States*, 358 U.S. 307, 310 n.3 (1959) (describing "probable cause" and "reasonable grounds" as "substantial equivalents"); see also, *e.g.*, Minn. Stat. Ann. § 169A.51(1)-(2) (West Supp. 2016). A similar requirement applies to drivers on National Park lands. 36 C.F.R. 4.23(c).

A majority of States pair these implied-consent provisions with measures that ban nonconsensual chemical testing, whether with or without a warrant.

State Amicus Br. 1a-34a (cataloging bans in 28 States and the District of Columbia). For example, Minnesota provides that if a suspect refuses to submit to chemical testing, "a test must not be given." Minn. Stat. Ann § 169A.52(1) (West Supp. 2016).[2] As this Court has explained, this approach of requiring consent but "declin[ing] to authorize * * * police officers to administer a blood-alcohol test against the suspect's will" is designed "to avoid violent confrontations" between intoxicated arrestees and police officers or medical personnel. *South Dakota* v. *Neville*, 459 U.S. 553, 559 (1983).

Implied-consent provisions, including the Minnesota and North Dakota provisions, most commonly require consent to a test of either breath, blood, or urine. State Amicus Br. 1a-34a. Breath tests are the most commonly used method. NHTSA, *Use of Warrants to Reduce Breath Test Refusals: Experiences From North Carolina* 1 (2011) (*N.C. Warrants*). Machines used to conduct breath tests are commonly located at police stations where drivers are taken following arrest. In some departments they are also available in the field, so that "the officer may obtain the sample at roadside in the patrol vehicle or in a BATmobile"—a vehicle used "to test and temporarily detain DWI offenders." NHTSA, *Refusal of Intoxication Testing: A Report to Congress* 4 (2008) (*Report to Congress*); see 1 *Apprehending and Prosecuting the Drunk Driver* § 7.04 (LexisNexis 2015) (noting newest breath-testing machines are "designed to be

---

[2] Several States make exceptions to their rules against nonconsensual chemical testing in cases involving especially aggravated circumstances, such as accidents involving death or serious injury. State Amicus Br. 1a-34a.

used as [] fully mobile evidential breath tester[s] in the field"). Because breath tests used for evidentiary purposes require extended breaths to produce "alveolar or 'deep lung' breath," *Skinner* v. *Railway Labor Execs. Ass'n*, 489 U.S. 602, 616 (1989), such tests require the cooperation of their subjects, see Andre A. Moenssens & Fred E. Inbau, *Scientific Evidence in Criminal Cases* 82 (2d ed. 1978).

Most States also provide for blood testing under their implied-consent statutes. State Amicus Br. 1a-34a. That method can detect drugs in addition to alcohol, and it is sometimes favored because it measures blood-alcohol concentration directly, rather than relying on conversion of breath-alcohol levels. 2 *Defense of Drunk Driving Cases* § 18.01 (LexisNexis 2015); 1 *Apprehending and Prosecuting the Drunk Driver* § 7.02.

c. State efforts to accurately identify, sanction, and treat impaired drivers using implied-consent laws have been significantly undercut by drivers who simply refuse compliance—particularly as the penalties for impaired driving have become substantially more serious than the penalties for refusing a test. Robert B. Voas et al., *Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes*, 40 J. Safety Research 77, 78 (2009) (*Implied-Consent Review*). Early implied-consent provisions that typically punished refusal with license suspension were enacted "in an era when the most serious penalty the court would normally impose for impaired driving" was also license suspension. *Ibid.* But as sanctions for impaired driving escalated, especially for high-BAC and recidivist offenders, license suspensions failed to prevent high rates of test

refusal. NHTSA, *Use of Warrants for Breath Test Refusal: Case Studies* 1 (2007) (*Case Studies*); see NHTSA, *Breath Test Refusal Rates in the United States—2011 Update* 4 (2014) (*2011 Update*). Approximately one quarter of those arrested for drunk-driving offenses from 1996 to 2001 nationwide thus simply refused to comply with the chemical-test condition of their authorization to drive on state roads. *N.C. Warrants* 1. And some States have much higher refusal rates, with several reporting rates over 70% and several others reporting rates above 40%. *Ibid.*; *2011 Update* 2.

The "drivers who refuse the chemical test mandated by implied consent laws comprise a high-risk group" of particularly serious DWI offenders. NHTSA, *Implied Consent Refusal Impact* xvii (1991) (*Implied Consent Refusal Impact*). Studies demonstrate that they are likely to have especially high BAC levels. See NHTSA, *No Refusal Initiative Facts* 2 (2010) (*No Refusal Initiative Facts*); *N.C. Warrants* 21. In addition, they are especially likely to be recidivist drunk drivers. *Implied Consent Refusal Impact* 26. Indeed, a prior conviction for drunk driving increases the likelihood that a driver will refuse a chemical test more than any other factor. *Ibid.*

In a study examining refusal rates, recidivist offenders frequently reported that they refused "because they believed that the test result would enhance conviction for a multiple DWI" and expose them to penalties that they understood were "more severe than the refusal penalties." *Implied Consent Refusal Impact* xvii, 79. Staff of motor-vehicle departments also observed that because the licenses of many recidivist drunk drivers were already suspended or re-

voked, the threat of license suspension was not a meaningful incentive for those drivers to comply with chemical-testing conditions. *Ibid.*

Because test refusals deprive the public of the best evidence of intoxication, and likely the only evidence of high-BAC offenses, judges, prosecutors, and defense attorneys consistently report that refusals undermine drunk-driving prosecutions and make it especially difficult to enforce high-BAC provisions. *Case Studies* 36; *N.C. Warrants* 12-13; *Implied Consent Refusal Impact* 26-27. Some studies indicate that those who refuse chemical tests are significantly less likely to be convicted of impaired-driving offenses. H.L. Ross et al., *Causes and Consequences of Implied Consent Test Refusal*, 11 Alcohol, Drugs and Driving 59-60 (1995); *Implied Consent Refusal Impact* xvi.

d. As state and federal authorities have identified low sanctions as a principal cause of implied-consent violations, see, *e.g.*, *Report to Congress* 20; *2011 Update* 4, States have increasingly attached criminal penalties to some or all refusals.

Twelve States and the federal government (on National Park lands) now make it a criminal offense to refuse to comply with an implied-consent provision in all cases or in cases involving aggravated circumstances such as a prior refusal, a prior drunk-driving conviction, or when the refuser was driving on a suspended license. See State Amicus Br. 1a-34a (statutes of Alaska, Hawaii, Florida, Kansas, Louisiana, Minnesota, Nebraska, North Dakota, Rhode Island, Tennessee, Vermont, and Virginia); 36 C.F.R. 4.23(c); 36 C.F.R. 1.3(a). Five additional States treat refusal as a separate offense when an offender is also convicted of drunk driving, State Amicus Br. 4a, 32a (statutes of

California and Washington), or a fact that enhances the penalty for a drunk-driving conviction, see Md. Code Ann., Transp. § 27-101(x)(3) (LexisNexis Supp. 2015); 75 Pa. Cons. Stat. Ann. § 3804(c) (West Supp. 2015); Me. Rev. Stat. Ann. tit. 29-A, § 2411(5) (West 1996). A final State treats refusal as an infraction punishable by fines. Ind. Code Ann. § 9-30-7-5(a) (LexisNexis Supp. 2015).

NHTSA has recommended that all States make penalties for refusal greater than those for driving while intoxicated. *Report to Congress* 20.

NHTSA has also studied addressing refusals through search warrants and nonconsensual blood draws. NHTSA's studies suggest that even among States that do not statutorily prohibit nonconsensual blood draws to avoid violent confrontations, use of warrants to conduct nonconsensual blood draws is not widespread. See NHTSA, *Use of Warrants for Breath Refusal: Case Studies* 35 (2007); *N.C. Warrants* 16-17. In a study of jurisdictions that tested nonconsensual warranted blood draws when arrestees refused breath tests, the method substantially increased the time from arrest to test—because of additional steps such as traveling to a medical facility and securing the assistance of a phlebotomist. *N.C. Warrants* 11-12, 15-16.

2. Petitioner Bernard was arrested at a boat launch in Minnesota, after being identified as the individual who drove a truck into the river while attempting to remove a boat from the water. Bernard was holding the truck's keys and wearing only underwear. Officers observed that he smelled of alcohol and that his eyes were bloodshot and watery. When questioned, Bernard admitted he had been drinking, but

refused to perform field sobriety tests. Officers arrested him. 14-1470 Pet. App. 3a.

At the police station, officers read Bernard an implied-consent advisory notifying him that he was required under state law to consent to a breath test. 14-1470 Pet. App. 4a. Bernard refused. *Ibid.* He was charged under Minnesota's first-degree test-refusal statute, which applies to any person with at least three prior impaired-driving convictions over the past ten years. *Id.* at 4a & n.1. (Bernard had four prior impaired-driving convictions in that period. *Ibid.*)

Bernard sought dismissal of the test-refusal charge on the ground that the refusal statute deprived him of due process by penalizing him for failing to submit to an unreasonable warrantless search. 14-1470 Pet. App. 4a. The trial court agreed, *id.* at 47a-61a, but the Minnesota Court of Appeals reversed, *id.* at 35a-46a, and the Minnesota Supreme Court affirmed that decision, *id.* at 1a-34a. The court concluded that the test-refusal statute did not penalize Bernard for failing to submit to an unreasonable search, because a breath test constitutes a lawful search incident to arrest. *Id.* at 7a-19a. Two Justices dissented. *Id.* at 22a-34a.

3. Petitioner Birchfield was arrested after driving his car into a ditch in North Dakota. He failed field sobriety tests, and a preliminary breath test using a portable device indicated his BAC level was more than three times the legal limit. 14-1468 Pet. App. 2a.

Following arrest, an officer read Birchfield North Dakota's implied-consent advisory, stating that Birchfield was required to consent to a chemical test and that refusal was punishable in the same manner as driving under the influence of alcohol. 14-1468 Pet. App. 2a; see N.D. Cent. Code § 39-20-01(3)(a) (Supp.

2015). The officer then asked Birchfield to take a blood test. See 14-1468 Pet. App. 2a, 24a, 26a. He refused. He was charged with violating North Dakota's implied-consent statute. *Id.* at 2a.

After the state trial court denied Birchfield's motion to dismiss on Fourth Amendment grounds, see 14-1468 Pet. App. 22a-28a, Birchfield entered a conditional guilty plea, *id.* at 2a-3a. He was sentenced to 30 days of imprisonment, with all but ten days suspended, and ordered to participate in a yearlong sobriety program; obtain an evaluation for substance abuse and addiction; and pay fees and fines. *Id.* at 20a-21a.

The North Dakota Supreme Court affirmed Birchfield's conviction. 14-1468 Pet. App. 2a-18a. After noting that implied-consent statutes attaching criminal penalties to test refusal had consistently been upheld before and after this Court's decision in *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013), the court found such statutes to be reasonable under the Fourth Amendment based on a balancing of the public interests served by such provisions against their intrusion on reasonable expectations of privacy. 14-1468 Pet. App. 6a-16a.

4. Petitioner Beylund was arrested following a traffic stop in North Dakota. Before the stop, an officer observed Beylund's vehicle nearly hit a stop sign before stopping, partially in a driveway and partially in the roadway. When the officer approached the vehicle, he could smell alcohol. He also observed an empty wine glass in the center console. Beylund appeared to struggle with his balance upon exiting the vehicle. He refused to perform any field sobriety tests, claiming he had a bad leg. 14-1507 Pet. App. 2a-3a.

The officer arrested Beylund and transported him to a hospital. There, he read Beylund North Dakota's advisory regarding implied-consent requirements and the consequences of refusal. Beylund agreed to a blood test, which showed his BAC level was about three times the legal limit. 14-1507 Pet. App. 3a.

An administrative officer suspended Beylund's driving privileges for two years, finding probable cause that Beylund had been driving while intoxicated, based on the evidence from the traffic stop and chemical test. 14-1507 Pet. App. 40a-42a.

Beylund appealed, contending that the BAC evidence should have been excluded from the administrative proceeding. In particular, Beylund argued that North Dakota's implied-consent law imposed an unconstitutional condition on the right to drive and that his consent to a blood test had been involuntary because it was procured under the threat of unconstitutional sanctions. The state trial court rejected that claim. 14-1507 Pet. App. 23a-37a. The North Dakota Supreme Court affirmed, agreeing that the implied-consent statute did not impose an unconstitutional condition on driving privileges. *Id.* at 1a-20a.

SUMMARY OF ARGUMENT

Petitioners contend that States' use of criminal sanctions to enforce their valid implied-consent laws is unconstitutional. That contention is incorrect. And even if such measures posed a constitutional problem when blood testing was involved, provisions that require warrantless breath testing would survive constitutional review.

A. 1. The statutes at issue here are constitutional, because States may validly use criminal sanctions to enforce a driver's legitimate obligations. All 50 States

have conditioned permission to drive on a limited requirement of consent to chemical testing, through implied-consent measures that this Court has long explained are valid. While States may not use "nonconsensual blood testing in all drunk-driving cases" without a more specific analysis of exigency, *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1556 (2013), they may "require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense" and impose "significant consequences" on drivers who refuse to comply, *id.* at 1566 (plurality opinion); see *South Dakota* v. *Neville*, 459 U.S. 553 (1983). As this Court has recognized, such rules serve critical interests in deterring drunk drivers, obtaining the most reliable evidence of intoxication, and eliminating the need for forcible, nonconsensual blood draws that most States eschew to avoid violent confrontations.

2. Contrary to petitioner Birchfield's suggestion, the doctrine of unconstitutional conditions does not forbid States from conditioning authorization to drive on these chemical-testing requirements. No blanket ban exists on conditioning government benefits on search requirements. Rather, this Court has upheld such conditions under the Fourth Amendment when they are reasonable in light of a balancing of interests—as implied-consent statutes are, for the reasons developed by this Court in discussing such statutes. And if the Court reassessed implied-consent requirements through an unconstitutional conditions lens, Birchfield would fare no better, for that doctrine bars only conditions that lack an adequate relation-

ship to the benefit at hand or are disproportionate. Implied-consent requirements are neither.

3. Birchfield errs in asserting that even if implied-consent requirements are valid, principles of proportionality forbid the use of criminal penalties to enforce them. The relevant condition here is that, in exchange for the privilege of driving, the driver relinquishes any right to refuse a chemical test under certain limited conditions. Given the validity of that condition, the use of traditional state enforcement mechanisms to secure compliance cannot be considered disproportionate.

The criminal sanctions before the Court in these cases are particularly proportionate because they involve only the level of sanctions necessary to eliminate drunk drivers' incentive to refuse compliance with implied-consent obligations. Research demonstrates that administrative sanctions are inadequate to stem refusals—especially for recidivist and high-BAC offenders. Absent criminal penalties, refusal in the hopes of avoiding a drunk-driving conviction is too tempting. Birchfield suggests no alternative to criminal sanctions for stemming the tide of non-compliance, but instead argues that States could rely on nonconsensual blood draws. That method, however, is materially worse than criminal enforcement, because it requires forcible intrusions that most States ban to protect against violent confrontations.

Finally, Birchfield errs in suggesting that criminal sanctions are disproportionate because States could address drunk driving through strategies like open-container provisions, high-BAC laws, and increased offender supervision. States are not required to choose only one approach to combatting drunk driv-

ing. And Birchfield's suggestion fails on its own terms, because many of the measures he extols require blood-alcohol evidence for effective implementation.

B. Regardless of the validity of implied-consent provisions generally, States may impose criminal penalties for refusal to take a breath test when probable cause of intoxication is established. States may unquestionably use criminal laws to ensure that officers may conduct searches or seizures that do not require warrants under the Constitution. And while this Court has not previously decided whether breath tests are subject to a warrant requirement, a balancing of public and private interests decidedly supports permitting warrantless breath tests based upon probable cause.

Warrantless breath tests serve interests in obtaining evanescent evidence that cannot be adequately served through other means. They also enhance the accuracy of arrest determinations. The countervailing privacy interests are modest, because the intrusion of a breath test is negligible. Because warrantless breath tests based on probable cause are constitutionally reasonable, States may enact criminal provisions to ensure officers can carry out such tests.

ARGUMENT

STATES MAY MAKE REFUSAL TO COMPLY WITH A VALID CHEMICAL-TESTING REQUIREMENT A CRIMINAL OFFENSE

All 50 States condition the privilege of driving on consent to certain chemical testing in circumstances of suspected impairment. No constitutional principle bars States from using criminal penalties to enforce these legitimate obligations. The convictions of peti-

tioners Birchfield and Bernard are therefore valid, and petitioner Beylund was put to no unconstitutional choice. Further, under the balancing that guides Fourth Amendment analysis, warrantless breath tests based on probable cause, such as those at issue in Bernard's case, would pass muster even if petitioners were correct that implied-consent obligations more generally were deficient.

A. States May Enforce Valid Implied-Consent Rules Through Criminal Sanctions

While this Court has held that a State may not use "nonconsensual blood testing in all drunk-driving cases" without a more specific analysis of exigency, *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1556 (2013), it has been equally emphatic that States may "require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense" and impose "significant consequences" on drivers who refuse to comply, *id.* at 1566 (plurality opinion). Birchfield proffers no good reason to revisit this longstanding guidance. Nor is there merit to Birchfield's alternative contention that principles of "proportionality" limit enforcement of valid implied-consent requirements to administrative sanctions. The criminal sanctions States have imposed are a proportionate means to secure compliance, and Birchfield's administrative alternatives are demonstrably inadequate to that task, particularly for the most dangerous drivers.

1. This Court has properly recognized implied-consent obligations as valid

Over several decades, this Court's cases have provided substantial guidance concerning the measures that States may employ to address the "terrible toll" inflicted by impaired drivers. *McNeely*, 133 S. Ct. at 1565 (plurality opinion). That guidance makes clear that the "broad range of legal tools" available include rules "that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Id.* at 1566 (plurality opinion).

The Court first concluded that States may require consent to chemical testing as a condition of the privilege to drive (and penalize those who refuse to comply) in *South Dakota* v. *Neville*, 459 U.S. 553 (1983). *Neville* considered a Fifth Amendment challenge to South Dakota's implied-consent law, which required drivers to consent to a blood test if arrested for driving while intoxicated, and penalized drivers who failed to comply by revoking their licenses and permitting their refusals to be used as evidence against them in drunk-driving prosecutions. *Id.* at 560. The Court rejected the defendant's constitutional challenge. Critically, its basis for doing so was not that refusals were non-testimonial (a ground that the Court declined to adopt), *id.* at 561-562, but rather that States could legitimately require chemical tests as a condition of licensing and impose significant penalties on those who do not comply with those conditions, *id.* at 560-563. It was "unquestionably legitimate," the Court wrote, for States to impose the penalty of revoking driving privileges on those who refused to

consent to a chemical test required as a condition of the authorization to drive. *Id.* at 560. And because admission of a defendant's statements in evidence could be classified as an additional "attendant penalt[y]" for refusal, the Court concluded that the use of a driver's refusal as evidence in a criminal case posed no constitutional problem. *Id.* at 563.

If there were doubt after *Neville* about the constitutionality of state laws conditioning the privilege to drive on chemical-testing conditions, *McNeely* resolved it. *McNeely* held that absent exigent circumstances, which are not automatically supplied by "the natural dissipation of alcohol in the bloodstream," a State may not conduct warrantless, nonconsensual blood testing in a drunk-driving investigation. 133 S. Ct. at 1568. While no opinion spoke for the Court on the precise definition of exigency, the plurality advancing the narrowest view of the exigent-circumstances question before the Court recognized that States retained a "broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." *Id.* at 1566. This range of tools, it reaffirmed, includes "implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing" and that "impose significant consequences when a motorist withdraws consent." *Ibid.* None of the Justices taking broader views of officers' exigent circumstances authority disagreed with that reaffirmation. See *id.* at 1572-1573 (Roberts, C.J., concurring in part and dissenting in part); *id.* at 1574-1578 (Thomas, J., dissenting); see also *id.* at 1569 (Kennedy, J., concurring in part) (emphasizing that States retain the pow-

er to "adopt rules, procedures, and protocols that meet the reasonableness requirements of the Fourth Amendment").

The Court's decisions approving of these measures have explained the critical purposes they serve. Drunk driving, this Court has emphasized, exacts a "terrible toll" on society. *McNeely*, 133 S. Ct. at 1565 (plurality opinion); see *Neville*, 459 U.S. at 558; *Mackey* v. *Montrym*, 443 U.S. 1, 17-18 (1979). And accurate identification of the drunk drivers who exact that toll depends on the chemical evidence that forms "the most reliable form of evidence of intoxication." *Mackey*, 443 U.S. at 19. Moreover, evidence of impairment is evanescent, so that blood or breath samples "must be obtained as soon as possible," *Skinner* v. *Railway Labor Execs. Ass'n*, 489 U.S. 602, 623 (1989), in order to most accurately reflect the blood-alcohol level of a driver at the time he was on the road, see *Schmerber* v. *California*, 384 U.S. 757, 770-771 (1966); see also *McNeely*, 133 U.S. at 1561.

Against this backdrop, implied-consent requirements serve critical interests. Before a traffic stop occurs, they have deterrent force. While significant penalties are critical to "deterr[ing] * * * drunken driving," *Mackey*, 443 U.S. at 18, those penalties "cannot serve as an effective deterrent unless violators know that they are likely to be discovered," *Skinner*, 489 U.S. at 630. Drivers who expect that a chemical test will reveal their intoxication in the event that they are stopped will thus be less likely to drink and drive. See *Mackey*, 443 U.S. at 18; cf. *Skinner*, 489 U.S. at 632 (explaining that mandatory drug and alcohol testing of railroad employees following certain safety events constitutes a "highly effective means

* * * of deterring the use of drugs by railroad employees").

Second, implied-consent provisions are an important method of obtaining the blood-alcohol evidence that constitutes "the most reliable form of evidence of intoxication," *Mackey*, 443 U.S. at 19, and of doing so "as soon as possible," in light of the evidence's evanescence, *Skinner*, 489 U.S. at 623. Indeed, implied-consent requirements may be indispensable to obtaining blood-alcohol evidence in cases involving testing by breath. Because evidential breath testing devices require active participation by the person being tested, in the absence of implied-consent requirements to induce compliance, the State will simply be unable to conduct a breath test. And while officers may be able to conduct nonconsensual blood draws under the exigent circumstances doctrine or to seek blood-draw warrants in the minority of States that allow those approaches, switching to a blood-draw method will often occasion substantial delay. See p. 9, *supra* (discussing delay occasioned by shift from breath tests to blood draws).

Finally, implied-consent provisions backed by sanctions sufficient to induce compliance are critical to enabling States to detect drunk drivers while avoiding recourse to forcible methods. This Court has recognized that most States bar such methods in order "to avoid violent confrontations" between intoxicated arrestees, officers, and medical personnel. *Neville*, 459 U.S. at 559; see *McNeely*, 133 S. Ct. at 1566 (plurality opinion) (noting most States ban nonconsensual testing).

2. Birchfield's attacks on implied-consent obligations lack merit

Notwithstanding this Court's cases, Birchfield suggests (Br. 33-34) that the "unconstitutional conditions" doctrine forbids States from conditioning authorization to drive on their roads on a requirement of consent to chemical testing.

Birchfield is incorrect. This Court's precedents demonstrate that no flat ban exists against conditioning a government benefit on compliance with a search condition. Instead, this Court has analyzed such requirements for reasonableness—and upheld search-related conditions on persons who receive particular benefits when the conditions were supported by a balancing of interests. See, *e.g. Samson* v. *California*, 547 U.S. 843, 854-856 (2006) (warrantless search condition for parolees who accept early release); *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 661-662 (1995) (warrantless drug tests of participants in school athletic program); *National Treasury Emps. Union* v. *Von Raab*, 489 U.S. 656, 659 (1989) (urinalysis requirement as to Customs Service employees who seek transfer or promotion to certain positions); cf. *Wyman* v. *James*, 400 U.S. 309, 318-319 (1971) (suggesting Fourth Amendment was not implicated by State's requiring warrantless home inspections as a condition of certain government benefits, but also finding the requirements would be reasonable under the Fourth Amendment). The strong public interests this Court has found served by implied-consent provisions amply support this Court's statements that the implied-consent obligations imposed in all 50 States are reasonable under the Fourth Amendment. And a

requirement that is reasonable under the Fourth Amendment cannot be an "unconstitutional condition."

If this Court reassessed implied-consent requirements through an unconstitutional conditions lens, Birchfield would fare no better. The unconstitutional conditions doctrine provides that "the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government *where the benefit sought has little or no relationship*" to the condition imposed, *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994) (citing *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Pickering* v. *Board of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968)) (emphasis added).[3] Sufficiently

---

[3] This is evident in the materials on which Birchfield relies. For example, Birchfield relies (Br. 33) on *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583, 593 (1926), which struck down a requirement that those who use state highways accept a condition that the state could not have constitutionally imposed on all citizens, while opining that a State may not condition a "valuable privilege" on "surrender of a right." But this Court later clarified that the condition in *Frost* had been defective only because it was unrelated to the government benefit conferred. *Stephenson* v. *Binford*, 287 U.S. 251, 275-276 (1932). It had been, the Court explained, "in no real sense a regulation of the use of the public highways," so that "the use of the highways furnished a purely unrelated occasion for imposing the unconstitutional condition." *Id.* at 275. *Stephenson* then *upheld* a rule conditioning highway use on a requirement that could not have been imposed on the citizenry as a whole, reasoning that the statute at hand was appropriate highway regulation. *Ibid.* Similarly, the law review article Birchfield cites (Br. 33) for an unconstitutional conditions rule that the "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right," Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989), explained that its formulation did not accurately reflect the holdings of this Court's cases, *e.g.*, *id.* at 1416-1417.

germane conditions, however, are not categorically barred. For instance, a State may condition a land-use permit on a relinquishment of property when there is a "nexus" and "rough proportionality" between a state demand and the effects of the private land use authorized by the permit, *Dolan*, 512 U.S. at 386-392; see also *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013); a government employer may impose some speech limits as a condition of employment that could not be imposed on citizens at large, *Connick* v. *Myers*, 461 U.S. 138, 147 (1983); and the federal government may condition grants on requirements that States enact particular legislation, when the conditions are sufficiently germane and the grants not so large that denial would be unduly coercive, *South Dakota* v. *Dole*, 483 U.S. 203, 210, 211 (1987). Indeed, Birchfield himself ultimately acknowledges (Br. 36) that this Court has assessed "the propriety of a government condition" based "on whether there is a 'nexus' and 'rough proportionality' between the state-provided benefit and the condition imposed" in those cases "where the grant of the benefit might 'impose costs on the public.'" A risk to the public is plainly present when a State grants permission to maneuver tons of steel down public roads.

Under a nexus-and-proportionality analysis, Birchfield's suggestion that implied-consent requirements are constitutionally deficient again falls short. Birchfield cannot plausibly contend that a test of whether a driver poses a danger to others on the road somehow lacks a nexus to driving privileges. So Birchfield instead asserts (Br. 36) that driving is so necessary that it is impermissibly coercive for a State to attach test conditions to it—no matter the importance of

those conditions to the privilege's safe exercise. This Court, however, long ago foreclosed that approach. Emphasizing that "[m]otor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property," this Court has treated the right to drive as a paradigmatic privilege to which States may attach conditions. *Hess* v. *Pawloski*, 274 U.S. 352, 356 (1927). The conditions it has upheld have included rules that could not have been constitutionally imposed on the public at large. *Ibid.* (upholding requirement that motorist give "implied consent" to appointment of state registrar as representative for service of process in cases arising from accidents); see, *e.g.*, *Stephenson* v. *Binford*, 287 U.S. 251, 275-276 (1932).

Today, driving is subject to even more "pervasive and continuing governmental regulation[] and control[]." *South Dakota* v. *Opperman*, 428 U.S. 364, 367-368 (1976). Unconstitutional conditions principles therefore do not bar States from enacting "implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing," and "impose significant consequences when a motorist withdraws consent." *McNeely*, 133 S. Ct. at 1566 (plurality opinion).

3. Principles of "proportionality" do not forbid use of criminal penalties to enforce implied-consent requirements

In the alternative, Birchfield argues (Br. 37-46) that even if it is permissible for States to condition authorization to drive on an implied-consent requirement—as all 50 States do—principles of proportionality that Birchfield derives from Takings

Clause cases forbid States from holding drivers to that bargain through criminal sanctions for refusal. That claim is flawed.

First, Birchfield's claim misunderstands the appropriate object of an unconstitutional conditions or Fourth Amendment analysis. As Birchfield appears at times to recognize (see, *e.g.*, Br. 35), the relevant condition for purposes of analysis under either of these doctrines is the right a citizen is required to forego in exchange for a government benefit—here, the right to refuse a chemical test based on probable cause of impairment or an impaired-driving arrest. When Birchfield protests criminal sanctions for test refusal, he is not protesting this condition—rather, he is protesting the means that many States use to enforce compliance with a condition long recognized as valid. Birchfield points to no case invalidating a mechanism used to hold a citizen to a constitutionally permissible bargain.[4] Once a condition has been deemed valid, no reason exists to consider disproportionate

---

[4] Birchfield errs (Br. 30-32) in relying for a prohibition on criminal sanctions on *Los Angeles* v. *Patel*, 135 S. Ct. 2443 (2015), and *Camara* v. *Municipal Court*, 387 U.S. 523 (1967). Those decisions invalidated warrantless inspection schemes as unreasonable under the Fourth Amendment. See *Patel*, 135 S. Ct. at 2452-2456 (finding unconstitutional a rule requiring disclosure of hotel registers without opportunity to first obtain judicial review); *Camara*, 387 U.S. at 540 (concluding that residential inspections could be conducted only pursuant to a warrant, and that petitioner could not be convicted of refusing inspector entry because he "had a constitutional right to insist that the inspectors obtain a warrant to search"). Neither case suggested that the inspection schemes at issue were constitutionally valid, but could be enforced only through civil means.

the use of traditional state enforcement mechanisms to ensure compliance with lawful demands.

In any event, the criminal sanctions before the Court in these cases qualify as proportionate by any measure. By allowing sanctions similar to those for drunk-driving offenses, these statutes allow only the sanctions necessary to eliminate an incentive that otherwise exists for drunk drivers to refuse compliance with valid implied-consent obligations. See, *e.g.*, *2011 Update* 4 ("States noted that refusal rates will remain high if the sanctions for failing a BAC test * * * are more severe than those for refusing to submit to a test."); *Implied-Consent Review* 78; *Report to Congress* 20. Indeed, without criminal sanctions, the incentive to refuse compliance is especially powerful in situations where BAC evidence is most vital—the cases involving extremely impaired drivers whose refusals can utterly stymie the State's ability to prove the aggravated, high-BAC charges that are increasingly a focus of State efforts to stem drunk-driving deaths. Cf. Birchfield Br. 46 (describing high-BAC penalties as a "constitutional and effective strateg[y] for combating drunk driving").

Research bears out that in an era in which serious criminal penalties can follow from drunk-driving convictions, purely administrative sanctions are not adequate to enforce implied-consent conditions. See *2011 Update* 1, 6 (finding average refusal rate of 24%, with the rate exceeding 70% in some jurisdictions). The research also demonstrates that purely administrative sanctions are in fact especially unlikely to deter recidivist and high-BAC offenders. See *No Refusal Initiative Facts* 2; *N.C. Warrants* 21; *Implied Consent Refusal Impact* 26. Indeed, research shows that those

offenders are often driving on suspended or revoked licenses in the first place—making license-related penalties particularly ineffective. *Implied Consent Refusal Impact* 26.

Remarkably, although Birchfield asserts that criminal sanctions are "disproportionate" to enforcing implied-consent requirements (Br. 40), he makes no suggestion that any administrative approach would be adequate to obtain compliance with implied-consent requirements among drunk drivers. Instead, he argues (Br. 41, 45) that States could attack drunk driving *without* enforcing implied-consent requirements, by measures such as forcible blood testing pursuant to warrants, "mass media campaigns," and "alcohol-vendor compliance checks." This argument proves too much, for the obvious implication is that the implied-consent requirements that this Court has described as appropriate are themselves not reasonable or proportionate, simply because States could address drunk driving in other ways.

In any event, Birchfield errs in suggesting that other strategies could readily substitute for implied-consent mechanisms. Birchfield first argues (Br. 41) that use of criminal penalties to secure compliance with implied-consent provisions is disproportionate because States could go without blood-alcohol evidence and prosecute drunk drivers based on officers' observations alone. Such an approach, however, would severely undermine efforts to identify, sanction, and treat drunk drivers because chemical-testing evidence is far and away the most accurate and probative evidence of intoxication. *E.g.*, *Mackey*, 443 U.S. at 15 ("The Commonwealth must have the authority, if it is to protect people from drunken drivers, to require

that the breath-analysis test record the alcoholic content of the bloodstream at the earliest possible moment."); *McNeely*, 133 S. Ct. at 1565 (plurality opinion); *Skinner*, 489 U.S. at 623. Indeed, it is the *only* evidence sufficient to establish that a driver has the very high BAC that reflects a particularly great public-safety threat—a fact of critical importance to the tiered approaches that 49 States use. See *Countermeasures* 1-15.

In the alternative, Birchfield suggests (Br. 42-44) that States can swiftly obtain blood-alcohol evidence by conducting nonconsensual blood draws pursuant to search warrants. This approach, however, is markedly inferior to enforcement of implied-consent provisions, because in addition to occasioning delay, it requires forcible, nonconsensual intrusions that most States ban as a matter of public policy. See *McNeely*, 133 S. Ct. at 1566 (plurality opinion); *Neville*, 459 U.S. at 559. As this Court has recognized, these prohibitions serve the compelling interest of avoiding "violent confrontations" that may ensue when officers attempt to draw blood forcibly from the veins of nonconsenting, intoxicated persons. *Neville*, 459 U.S. at 559.

Experience demonstrates that the risk of such confrontations is far from theoretical. See, *e.g.*, *United States* v. *Bullock*, 71 F.3d 171, 174 (5th Cir. 1995) (arrestee resisted blood draw "by kicking, hitting and attempting to bite" officers), cert. denied, 517 U.S. 1126 (1996); *Carter* v. *County of San Bernadino*, No. E044840, 2009 WL 1816658, at *2 (Cal. Ct. App. June 25, 2009) (during struggle related to blood test, arrestee "physically resisted being rehandcuffed by propelling himself backwards on the gurney and

throwing [officer] into the wall"); *State* v. *Worthington*, 65 P.3d 211, 212, 214 (Idaho Ct. App. 2002) (so much kicking and flailing that "lab technician feared that someone could be accidentally stuck by the needle"); *State* v. *Krause*, 484 N.W.2d 347, 349 (Wis. Ct. App. 1992) (arrestee claimed arm was injured during blood draw because he "struggled throughout the procedure" and "move[d his] arm back and forth so [the technician] couldn't do" the draw); see also *State* v. *Mason*, No. 02C-01-9310-CC-00233, 1996 WL 111200, at *6 (Tenn. Crim. App. Mar. 14, 1996); *McCann* v. *State*, 588 A.2d 1100, 1102 (Del. 1991); *People* v. *Rossetti*, 179 Cal. Rptr. 3d 148, 154 (Cal. Ct. App. 2014); *State* v. *Ravotto*, 777 A.2d 301, 309-310 (N.J. 2001); *Burns* v. *State*, 807 S.W.2d 878, 883 (Tex. Ct. App. 1991), abrogated by *Nguyen* v. *State*, 292 S.W.3d 671 (Tex. Crim. App. 2009); *State* v. *Lanier*, 452 N.W.2d 144, 146 (S.D. 1990), abrogated by *McNeely*, 133 S. Ct. at 1556.

Birchfield finally suggests (Br. 44-46) that States cannot employ criminal sanctions to ensure compliance with implied-consent laws because they could address drunk driving through other measures, like "alcohol-vendor compliance checks" and "open-container laws," which petitioner contends NHTSA has found more effective. As an initial matter, Birchfield is incorrect to assert that NHTSA has concluded that stringent test-refusal penalties are inferior to such strategies. NHTSA has strongly endorsed test-refusal penalties, including criminal sanctions, on the ground that purely administrative penalties are not adequate, *Report to Congress* 20, and that "[r]educed test refusal rates will help the overall DWI control system by providing better BAC evidence," *Counter-*

measures 1-17. The three-star rating of test-refusal penalties in NHTSA's *Countermeasures* manual reflects that as yet only one study has empirically assessed the effect of penalties on refusal rates—showing, as one would expect, that "test refusal rates appear to be lower in States where the consequences of test refusal are greater." *Ibid.*; see *id.* at 1-9 (explaining star ratings).

More critically, however, States are not required to select a single strategy to reduce the "terrible toll" that "drunk driving continues to exact." *McNeely*, 133 S. Ct. at 1565 (plurality opinion). As NHTSA noted in the manual on which Birchfield relies, "there is no 'silver bullet,' no single critical law, enforcement practice, or communications strategy" that is by itself sufficient to counteract drunk driving. *Countermeasures* 1-11. Even when "[e]xperts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal," this Court has explained that "the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources." *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 453-454 (1990).

In any event, Birchfield's suggestion that States could rely on the alternative strategies he identifies instead of implied-consent testing fails to appreciate that many of the strategies he extols—such as high-BAC penalties—depend on BAC evidence for appropriate implementation. See Br. 45-46 (discussing high-BAC sanctions, "limits on diversion and plea agreements," and "DWI offender monitoring" as possible alternative responses). And as noted above, the

forcible blood-testing method Birchfield suggests as an alternative for obtaining BAC evidence is not only barred in most States, but also likely to be less reliable and more dangerous. Under these circumstances, the considered choices by state and federal regulators on the appropriate sanctions for refusal to comply with valid implied-consent conditions should be upheld. If Fourth Amendment reasonableness or an unconstitutional conditions doctrine supported inquiry into the proportionality of sanctions to enforce legitimate conditions, the sanctions here would be proportionate.

B. States May Impose Criminal Penalties For Refusal To Take A Breath Test When Probable Cause Of Intoxication Is Established, Regardless Of The Validity Of Implied-Consent Provisions Generally

Regardless of the validity of implied-consent statutes generally, petitioner Bernard's conviction for refusing to take a breath test upon a showing of probable cause is consistent with the Fourth Amendment. States may undoubtedly use criminal laws to ensure that officers may conduct searches or seizures that do not require a warrant under the Constitution—as they do, for instance, by enacting laws that criminalize resisting arrest or interfering with a lawful search. While this Court has not previously decided whether breath tests are the type of intrusion that generally requires a warrant, the balancing of interests at the heart of Fourth Amendment analysis supports the conclusion that they do not.

1. In light of the Fourth Amendment's overarching command of "reasonableness," *Maryland* v. *King*, 133 S. Ct. 1958, 1969 (2013), whether a warrant is required for a breath test based upon probable cause depends

on a balancing of the interests at stake. This Court has explained, in particular, that while searches "undertaken by law enforcement officials to discover evidence of criminal wrongdoing" typically require warrants, those procedures are not required for every type of criminal search. *Riley* v. *California*, 134 S. Ct. 2473, 2482 (2014) (citation omitted). Instead, "[a]bsent more precise guidance from the founding era," this Court "generally determine[s] whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy, and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.* at 2484 (quoting *Wyoming* v. *Houghton*, 526 U.S. 295, 300 (1999)).

Under these principles, this Court has approved warrantless searches or seizures "[w]hen faced with special law enforcement needs," in contexts presenting "diminished expectations of privacy," and for "minimal intrusions"—among other circumstances. *Illinois* v. *McArthur*, 531 U.S. 326, 330 (2001) (citing *Pennsylvania* v. *Labron*, 518 U.S. 938, 940-941 (1996) (per curiam) (search of automobile supported by probable cause); *Sitz*, 496 U.S. at 455 (suspicionless stops at drunk driver checkpoint); *United States* v. *Place*, 462 U.S. 696, 706 (1983) (temporary seizure of luggage based on reasonable suspicion); *Michigan* v. *Summers*, 452 U.S. 692, 702-703 (1981) (temporary detention of suspect without arrest warrant to prevent flight and protect officers while executing search warrant); *Terry* v. *Ohio*, 392 U.S. 1, 27 (1968) (temporary stop and limited search for weapons based on reasonable suspicion)).

2. It is reasonable to forgo warrant procedures for a breath test when probable cause exists to believe that a driver is intoxicated, in view of strong public interests and unusually weak privacy interests.

On the public side are interests in quickly and accurately identifying drunk drivers. No one can doubt the strength of the public interest in identifying, deterring, and punishing drunk drivers, *e.g.*, *McNeely*, 133 S. Ct. at 1565; *Sitz*, 496 U.S. at 451, or the corollary interest in obtaining blood-alcohol evidence "as soon as possible," because blood-alcohol evidence naturally dissipates, *Skinner*, 489 U.S. at 623. Because breath tests can only be obtained with the participation of the person being tested, the public's legitimate interest in obtaining swift BAC evidence requires that States be permitted under the Fourth Amendment to demand a breath test when there is probable cause of impaired driving. The possible alternative—forcible blood draws—will often be inadequate to serve the interest in obtaining evanescent blood-alcohol evidence as swiftly as possible, see, *e.g.*, *Skinner*, 489 U.S. at 623, because while breath tests can be conducted by law enforcement officers as part of arrest processing or in the field, blood tests typically require transport to a medical facility for a test by specialized personnel, see p. 9, *supra*.

The interest in swiftly obtaining this evidence is particularly great because probable cause of intoxication also justifies officers in making the far greater warrantless intrusion of an arrest. At the moment when officers are deciding whether to arrest a person for drunk driving based on this probable-cause standard, a strong interest exists in permitting a far less intrusive accompanying procedure that will enhance

the accuracy of the arrest decision. As this Court has observed, while the test may confirm that a driver was intoxicated, it can also "lead to prompt release of" an unimpaired driver, *Mackey*, 443 U.S. at 19, who would otherwise be subjected to the far more intrusive extended seizure of his person that a criminal charge would occasion, see *King*, 133 S. Ct. at 1978.

On the other side of the balance is an intrusion that is close to de minimis. Because the Fourth Amendment extends at least some protection to "[v]irtually any intrusio[n] into the human body," *King*, 133 S. Ct. at 1969 (citation and internal quotation marks omitted), breath tests indisputably constitute searches, insofar as they require deep exhalations to produce "alveolar or 'deep lung' breath," *Skinner*, 489 U.S. at 616; cf. *King*, 133 S. Ct. at 1969 (noting Fourth Amendment protections are sufficiently broad to extend "even to a breathalyzer test") (citation omitted). The extent of that intrusion, however, is minor along each dimension that this Court has considered. First, breath tests "are not invasive of the body," *Skinner*, 489 U.S. at 626, and unlike blood testing, "do not entail a surgical intrusion," *id.* at 617, or "piercing the skin," *id.* at 625. Second, also unlike blood tests, breath tests "may be conducted safely outside a hospital environment, and with a minimum of inconvenience or embarrassment." *Ibid.* Third, unlike urine tests, breath tests involve no monitoring of excretory or especially sensitive acts. *Id.* at 617. Finally, unlike conventional blood and urine tests, "breath tests reveal the level of alcohol in the * * * bloodstream and nothing more," *id.* at 625—disclosing "no other facts in which the [person tested] has a substantial privacy interest," *id.* at 626; cf. *United States* v. *Jacobsen*, 466

U.S. 109, 123 (1984) (explaining that an individual has no reasonable expectation of privacy with respect to "governmental conduct that can reveal whether a substance is cocaine, and no arguably 'private' fact").

Insofar as state laws shed light on whether breath tests may be required without a warrant, such laws strongly support allowing that procedure. All 50 States provide for warrantless breath tests under their implied-consent provisions. And the prohibitions in many jurisdictions on any type of forcible chemical testing on which Bernard relies (Br. 25-26) have little relevance, because forcible testing is not at issue (and not possible) here. Cf. *McNeely*, 133 S. Ct. at 1566 (assessing the reasonableness of *forcible* blood testing by looking to state rules concerning forcible blood testing). The state laws providing for warrantless breath testing thus reinforce that the intrusion of a breath test is "negligible"—a fact "of central relevance to determining reasonableness" under the Fourth Amendment. *King*, 133 S. Ct. at 1969.

Finally, a warrant system here would fail to serve an important traditional function of warrants—authorizing officers to perform a particular search regardless of consent—because breath tests cannot be performed on non-consenting persons even if a warrant is obtained. Individuals who are drunk and have already refused to comply with demands that are legitimately made under valid licensing conditions are not a promising class to respond to a warrant. A warrant system will therefore lead to delay, but not necessarily evidence.

In sum, States rules that permit warrantless breath testing based upon probable cause of intoxication appropriately account for the strong public inter-

ests and very modest intrusion here. The probable cause standard familiar to law enforcement officers is one this Court has commonly held sufficient to support warrantless intrusions. See, *e.g.*, *Skinner*, 489 U.S. at 624; *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985) (citing cases). Considering all the circumstances, the strong public interests in permitting officers to swiftly obtain evanescent evidence based on probable cause—at the time when they are making an arrest decision based on that same showing—far outweigh the negligible privacy costs of allowing that warrantless procedure.

CONCLUSION

The judgments of the Supreme Court of North Dakota and the Supreme Court of Minnesota should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General
THOMAS E. BOOTH
Attorney

MARCH 2016

Nos. 14-1468, 14-1470 & 14-1507

IN THE

Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

Additional Case Captions Listed Inside Front Cover

On Writs of Certiorari to the Supreme Court of Minnesota and the Supreme Court of North Dakota

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, N.Y. 10004
(212) 549-2500

CATHERINE E. STETSON
Counsel of Record
DANIEL J.T. SCHUKER
ANDREW D. SELBST
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491
cate.stetson@hoganlovells.com

Counsel for Amicus Curiae

WILLIAM ROBERT BERNARD, JR.,
Petitioner,

v.

STATE OF MINNESOTA,
Respondent.

STEVE MICHAEL BEYLUND,
Petitioner,

v.

GRANT LEVI, DIRECTOR OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,
Respondent.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE GOVERNMENT CANNOT MAKE IT A CRIME TO ASSERT A CONSTITUTIONAL RIGHT 4

A. Refusing To Consent To A Search Is An Assertion Of A Constitutional Right 4

1. A Chemical Test Of An Individual's Blood, Breath, Or Urine Is A Search 4

2. A Chemical Test Must Be Authorized By A Warrant Or Subject To An Exception 5

3. The Fourth Amendment Grants Individuals A Constitutional Right To Refuse A Warrantless Chemical Test 8

B. The Government May Not Impose Criminal Penalties Merely Because An Individual Has Claimed The Protection Of A Constitutional Right 9

II. THE CHALLENGED CRIMINAL PENALTIES CANNOT BE JUSTIFIED AS A "CONDITION" OF OBTAINING A DRIVER'S LICENSE 13

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES:

Arizona v. *Gant*,
556 U.S. 332 (2009) 7, 12

Boyd v. *United States*,
116 U.S. 616 (1886) 15

Camara v. *Mun. Court*,
387 U.S. 523 (1967) 8, 10, 11

Chandler v. *Miller*,
520 U.S. 305 (1997) 12

City of Los Angeles v. *Patel*,
135 S. Ct. 2443 (2015) 11

Coolidge v. *New Hampshire*,
403 U.S. 443 (1971) 6

District of Columbia v. *Little*,
339 U.S. 1 (1950) 9, 10, 11

Fernandez v. *California*,
134 S. Ct. 1126 (2014) 14

Georgia v. *Randolph*,
547 U.S. 103 (2006) 6

Hurst v. *Florida*,
136 S. Ct. 616 (2016) 2

Illinois v. *Rodriguez*,
497 U.S. 177 (1990) 6

Johnson v. *United States*,
333 U.S. 10 (1948) 6

Jones v. *United States*,
357 U.S. 493 (1958) 7

Katz v. *United States*,
389 U.S. 347 (1967) 7

TABLE OF AUTHORITIES—Continued

Page

Kennedy v. *Mendoza-Martinez*,
372 U.S. 144 (1963) 16

Kentucky v *King*,
563 U.S. 452 (2011) 7

Koontz v. *St. Johns River Water Mgmt. Dist.*,
133 S. Ct. 2586 (2013) 16, 17

Maryland v. *King*,
133 S. Ct. 1958 (2013) 2

McDonald v. *United States*,
335 U.S. 451 (1948) 6

Mich. Dep't of State Police v. *Sitz*,
496 U.S. 444 (1990) 13

Missouri v. *McNeely*,
133 S. Ct. 1552 (2013) ..... *passim*

Olmstead v. *United States*,
277 U.S. 438 (1928) 12

Perry v. *Sindermann*,
408 U.S. 593 (1972) 16

Riley v. *California*,
134 S. Ct. 2473 (2014) 2, 8, 11

Rumsfeld v. *Forum for Acad. & Institutional Rights, Inc.*,
547 U.S. 47 (2006) 17

Schmerber v. *California*,
384 U.S. 757 (1966) 4, 5, 9

Schneckloth v. *Bustamonte*,
412 U.S. 218 (1973) 15

TABLE OF AUTHORITIES—Continued

Page

See v. *City of Seattle*,
387 U.S. 541 (1967) 10, 11

Skinner v. *Ry. Labor Execs.' Ass'n*,
489 U.S. 602 (1989) 5

Smith v. *Doe*,
538 U.S. 84 (2003) 16

South Dakota v. *Neville*,
459 U.S. 553 (1983) 13

Speiser v. *Randall*,
357 U.S. 513 (1958) 17

Spencer v. *Kemna*,
523 U.S. 1 (1998) 13

State v. *Kordonowy*,
867 N.W.2d 690 (N.D. 2015),
petition for cert. docketed, No. 15-
989 (U.S. Feb. 3, 2016) 12

Union Pac. Ry. Co. v. *Botsford*,
141 U.S. 250 (1891) 4

Walker v. *Texas Div., Sons of*
Confederate Veterans, Inc.,
135 S. Ct. 2239 (2015) 2

Winston v. *Lee*,
470 U.S. 753 (1985) 5

STATUTES:

Minn. Stat. § 169A.20(2) 3, 12

Minn. Stat. §§ 169A.24-169A.276 10

Minn. Stat. § 169A.51(1) 3, 14

Minn. Stat. § 169A.51(2)(a)(1) 15

Minn. Stat. § 169A.51(2)(a)(2) 14, 15

TABLE OF AUTHORITIES—Continued

Page

N.D. Cent. Code § 39-08-01(1)(e) 3, 12

N.D. Cent. Code § 39-08-01(2)(a) 3

N.D. Cent. Code § 39-08-01(3) 10

N.D. Cent. Code § 39-08-01(5) 5

N.D. Cent. Code § 39-20-01(1) 3, 14

N.D. Cent. Code § 39-20-01(3)(a) 14, 15

CONSTITUTIONAL PROVISION:

U.S. Const. amend. IV 4, 13

OTHER AUTHORITY:

Brian McKenzie, U.S. Census Bureau, *Who Drives to Work? Commuting by Automobile in the United States: 2013* (2015) 16

IN THE

Supreme Court of the United States

Nos. 14-1468, 14-1470 & 14-1507

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

WILLIAM ROBERT BERNARD, JR.,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

STEVE MICHAEL BEYLUND,

Petitioner,

v.

GRANT LEVI, DIRECTOR OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Writs of Certiorari to the Supreme Court of Minnesota and the Supreme Court of North Dakota

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The American Civil Liberties Union respectfully submits this brief as *amicus curiae* in support of petitioners.[1]

INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU regularly participates in cases before this Court involving threats to constitutional liberties, and was counsel of record in *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013). *See also, e.g.*, *Hurst* v. *Florida*, 136 S. Ct. 616 (2016); *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015); *Riley* v. *California*, 134 S. Ct. 2473 (2014); *Maryland* v. *King*, 133 S. Ct. 1958 (2013). The ACLU is submitting this brief because these cases concern state statutes that make it a crime to assert a constitutional right, and thus threaten basic liberties under our Constitution.

---

[1] No party or counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund the brief's preparation or submission. No one other than *amicus curiae*, its members, or its counsel made any such monetary contribution. All parties have given their consent to this filing, in letters that have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

Drunk driving is a serious threat to public safety. But the disputed statutes in this case do not criminalize drunk driving. They criminalize the assertion of a constitutional right. And that is something the government cannot do.

Minnesota and North Dakota make it a crime to refuse a warrantless chemical test of a person's blood, breath, or urine to detect the presence of alcohol. Minn. Stat. §§ 169A.20(2), 169A.51(1); N.D. Cent. Code §§ 39-08-01(1)(e), 39-08-01(2)(a), 39-20-01(1). These chemical tests are searches under the Fourth Amendment, and declining to submit to a warrantless search that intrudes upon bodily integrity falls squarely within the ambit of that constitutional provision. An individual has a right to refuse to consent to such a search and insist that the police obtain a warrant. The government cannot criminalize that conduct.

The government cannot breach those constitutional limits indirectly through a licensing scheme, either. The States have broad powers to regulate conduct on the roads and impose significant consequences for drunk driving. They can suspend or revoke an individual's driver's license as a penalty for refusing a chemical test. These regulatory penalties rely on "implied consent" laws that presume a driver has agreed to take a chemical test if arrested on suspicion of drunk driving. But the very premise of these licensing conditions is *implied* consent, not actual consent voluntarily given by the individual—meaning that a motorist willing to face the attendant regulatory penalties can withdraw any such consent. A statute that threatens criminal penalties for

individuals who refuse to surrender a constitutional right exceeds the State's lawmaking powers.

ARGUMENT

I. THE GOVERNMENT CANNOT MAKE IT A CRIME TO ASSERT A CONSTITUTIONAL RIGHT.

A. Refusing To Consent To A Search Is An Assertion Of A Constitutional Right.

1. A Chemical Test Of An Individual's Blood, Breath, Or Urine Is A Search.

The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons * * *, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber* v. *California*, 384 U.S. 757, 767 (1966). Security in bodily integrity—literally, one's person—is at the core of this constitutional protection. *Id.* As this Court has long recognized, "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. Co.* v. *Botsford*, 141 U.S. 250, 251 (1891).

The chemical tests of a person's blood, breath, or urine covered by Minnesota's and North Dakota's statutes are searches under the Fourth Amendment. A blood test involves "a compelled physical intrusion

beneath [an individual's] skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation." *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1558 (2013). It is manifestly a search for constitutional purposes. *Id.*; *Schmerber*, 384 U.S. at 767. "Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *McNeely*, 133 S. Ct. at 1558 (quoting *Winston* v. *Lee*, 470 U.S. 753, 760 (1985)). Even though breath tests and urine tests do not involve the same skin-piercing intrusion as a blood test, the Court has made clear that these examinations of "biological samples" likewise "*must* be deemed Fourth Amendment searches." *Skinner* v. *Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 618 (1989) (emphasis added); *see id.* at 616-617 (noting that a breathalyzer test "generally requires the production of alveolar or 'deep lung' breath," "implicates similar concerns about bodily integrity," and "should also be deemed a search"); *id.* at 617 (explaining that a urine test "can reveal a host of private medical facts," "intrudes upon expectations of privacy that society has long recognized as reasonable," and "must be deemed [a] search[]").

2. A Chemical Test Must Be Authorized By A Warrant Or Subject To An Exception.

This Court has emphasized that "the importance of requiring authorization by a 'neutral and detached magistrate' before allowing a law enforcement officer to 'invade another's body in search of evidence of guilt is indisputable and great.'" *McNeely*, 133 S. Ct. at 1558 (quoting *Schmerber*, 384 U.S. at 770). The Court's "classic statement of the policy underlying

the warrant requirement," *Coolidge* v. *New Hampshire*, 403 U.S. 443, 449 (1971), retains its full force today:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. *United States*, 333 U.S. 10, 13-14 (1948); *see McDonald* v. *United States*, 335 U.S. 451, 455 (1948) (stressing the "high function" served by a search warrant, and explaining that "the Fourth Amendment has interposed a magistrate between the citizen and the police * * * so that an objective mind might weigh the need to invade that privacy in order to enforce the law"); *see also Illinois* v. *Rodriguez*, 497 U.S. 177, 191 (1990) (same). In this way, the warrant requirement empowers individuals to test the propriety of a search—and to ensure that the search is lawful—by withholding consent and triggering the involvement of a neutral magistrate.

Because a test of a person's blood, breath, or urine is a search, this intrusion on bodily integrity is unreasonable unless it is either justified by a warrant or subject to an exception to the warrant requirement. *See McNeely*, 133 S. Ct. at 1569-70. Exceptions to the warrant requirement are " 'jealously and carefully drawn.' " *Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006) (quoting *Jones* v. *United States*,

357 U.S. 493, 499 (1958)); *Katz* v. *United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." (footnote omitted)).

One such exception to the warrant requirement may arise "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky* v. *King*, 563 U.S. 452, 460 (2011). But the metabolization of alcohol in the bloodstream "does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *McNeely*, 133 S. Ct. at 1568. This Court has specifically instructed officers conducting drunk-driving investigations that exigency depends on the totality of the circumstances. *Id.* at 1556; *see also id.* at 1561 ("The context of blood testing is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a 'now or never' situation.").

Another exception to the warrant requirement attaches when a search is conducted as an incident to an arrest. But this Court has been at pains to emphasize that this exception should not swallow the general rule that the Fourth Amendment's warrant requirement persists "even when the search was conducted following a lawful arrest." *Id.* at 1558. Thus, the narrow search-incident-to-arrest exception attaches only where it is necessary to preserve evidence or promote officer safety. *See Arizona* v. *Gant*, 556 U.S. 332 (2009). Officer safety is, of course, not an issue when the search is for chemicals

contained in a suspect's blood, breath, or urine. *Cf. Riley* v. *California*, 134 S. Ct. 2473, 2485 (2014) ("Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or effectuate the arrestee's escape."). And the metabolization of alcohol in the bloodstream does not categorically justify an immediate, unconsented-to bodily intrusion without a warrant. *See McNeely*, 133 S. Ct. at 1559-60 (requiring exigent circumstances); *id.* at 1569 (Roberts, C.J., concurring in part and dissenting in part) (same); *see also Riley*, 134 S. Ct. at 2494. Indeed, this Court has repeatedly confirmed that an arrestee does not relinquish his or her constitutionally protected privacy interests in bodily integrity. *McNeely*, 133 S. Ct. at 1565 (noting that the Court has "never retreated * * * from [its] recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests").

3. The Fourth Amendment Grants Individuals A Constitutional Right To Refuse A Warrantless Chemical Test.

Individuals have a constitutional right to refuse to consent to a warrantless search. *Camara* v. *Mun. Court*, 387 U.S. 523, 540 (1967). They may insist accordingly that the authorities obtain a warrant first. *Id.* In *Camara*, an individual refused to allow municipal authorities to enter his residence to conduct a warrantless health and safety inspection. *Id.* at 525-527. The Court concluded that this individual "had a constitutional right to insist that the inspectors obtain a warrant to search." *Id.* at 540. And the Fourth Amendment's warrant requirement applies to

persons with at least as much force as it does to property. *Schmerber*, 384 U.S. at 770 ("Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned."). The neutral magistrate plays an "essential role as a check on police discretion." *McNeely*, 133 S. Ct. at 1562-63. Without a warrant, no independent judicial arbiter has certified the search to be lawful and reasonable under the Fourth Amendment.

An individual wishing to exercise his Fourth Amendment right to refuse consent to a warrantless chemical test need only express that refusal clearly. Two petitioners did precisely that, and they did so in a peaceable manner. *See Birchfield* Pet. App. 2a; *Bernard* Pet. App. 3a. They "neither used nor threatened force of any kind." *District of Columbia* v. *Little*, 339 U.S. 1, 5 (1950). They did, however, effectively and unmistakably "protest[]" that the officers' intended search "would violate [their] constitutional rights." *Id.*

B. The Government May Not Impose Criminal Penalties Merely Because An Individual Has Claimed The Protection Of A Constitutional Right.

Minnesota and North Dakota make it a crime for an individual arrested on suspicion of driving while impaired to refuse a chemical test, even if the authorities have not obtained a warrant for that search. And the criminal penalties can be significant. Depending on the circumstances, test refusal can be a misdemeanor or a felony, and a conviction can result in incarceration ranging from days to years. *See*

Minn. Stat. §§ 169A.24-169A.276; N.D. Cent. Code § 39-08-01(3), (5).

The States have ample power to regulate driving-related conduct and enforce their drunk-driving laws. But the exercise of those powers cannot exceed constitutional limits. Most critically, a State may not subject individuals to criminal sanctions simply because they have asserted a constitutional right. *See Camara*, 387 U.S. at 540 (individual "may not constitutionally be convicted for refusing to consent to" warrantless search of his residence); *see also See* v. *City of Seattle*, 387 U.S. 541, 546 (1967) (individual "may not be prosecuted for exercising his constitutional right to insist" on warrant to search business premises).

This Court similarly has made clear that asserting this Fourth Amendment right cannot constitute the kind of active interference with law enforcement that independently constitutes a crime. In *Little*, the Court invalidated the conviction of an individual who had declined to consent to a warrantless inspection of her home. 339 U.S. at 6-7. She had refused to unlock the door for the authorities and claimed that the warrantless search would violate her constitutional rights. *Id.* at 5. Based on nothing more than this protest—a "mere refusal to unlock the door accompanied by remonstrances on substantial constitutional grounds"—she was convicted of interfering with an officer in the discharge of his duties. *Id.* at 5-6. This Court concluded that the refusal to consent to a warrantless search, coupled with "mere remonstrances or even criticisms of an officer," generally does not constitute criminal "interference" with a government official. *Id.* at 6. So too here: a verbal

refusal to accede to a search, without more, plainly does not rise to the level of criminal conduct.

Little was issued nearly seventy years ago; *Camara* and *See* were decided fifty years ago. The statutes at issue here thus are several decades behind the times, for they compel an individual to choose between the ability to assert a constitutional right and a criminal conviction. The "practical effect" of a system that requires such a choice "is to leave the occupant subject to the discretion of the official in the field." *Camara*, 387 U.S. at 532. That is the very discretion that this Court has "consistently circumscribed by a requirement that a disinterested party warrant the need to search." *Id.* at 532-533; *see also City of Los Angeles* v. *Patel*, 135 S. Ct. 2443, 2451-54 (2015) (municipal code provision unconstitutional where it forced business owners to submit to a search, at risk of criminal penalties, without affording an opportunity for review before a neutral decisionmaker). The specter of criminal penalties, combined with the lack of independent review through the warrant process, "creates an intolerable risk" that officers will exceed the strictures of the Fourth Amendment. *Patel*, 135 S. Ct. at 2452-53.

It does not suffice under the Constitution that the (purportedly) criminal act of declining to consent to a chemical test occurs in conjunction with an arrest on suspicion of driving under the influence. This arrest does not void an arrestee's constitutional privileges; that is why a search incident to arrest is a narrow exception to the Fourth Amendment's general prohibition, not an invitation to a warrantless free-for-all. *See Riley*, 134 S. Ct. at 2489 ("Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a

narrow intrusion on privacy."); *Gant*, 556 U.S. at 351; *see also Chandler* v. *Miller*, 520 U.S. 305, 322 (1997) (" '[I]t is . . . immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent.' ") (alterations in original) (quoting *Olmstead* v. *United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)). And in fact, under the statutes at issue in these cases, the State need not subsequently charge the individual with a separate drunk-driving offense at all. *See* Minn. Stat. § 169A.20(2) (making it a crime to "refuse to submit to a chemical test" for intoxication at the direction of an officer, full stop); N.D. Cent. Code § 39-08-01(1)(e) (making it a crime to "refuse[] to submit to * * * [a] chemical test" to determine alcohol concentration upon an officer's request, full stop). The petitioners here who were convicted under a test-refusal statute were, indeed, never charged with driving under the influence. *See Birchfield* Pet. Br. 5; *Bernard* Pet. Br. 7. Even if an individual is charged with a substantive drunk-driving offense but later acquitted, moreover, he or she may still be convicted and incarcerated under the test-refusal statute alone. *See State* v. *Kordonowy*, 867 N.W.2d 690, 692 (N.D. 2015) (upholding a jury verdict that found an individual "guilty of refusal to submit to chemical testing" but "not guilty of driving under the influence"), *petition for cert. docketed*, No. 15-989 (U.S. Feb. 3, 2016).

II. THE CHALLENGED CRIMINAL PENALTIES CANNOT BE JUSTIFIED AS A "CONDITION" OF OBTAINING A DRIVER'S LICENSE.

1. Drunk driving poses grave perils, and the government undoubtedly has an abiding interest in preventing it. *See Mich. Dep't of State Police* v. *Sitz*, 496 U.S. 444, 451 (1990). And in fact, the States "have a broad range of legal tools to enforce their drunk-driving laws and to secure [blood alcohol concentration] evidence without undertaking warrantless nonconsensual blood draws." *McNeely*, 133 S. Ct. at 1566. All fifty States and the District of Columbia have enacted implied-consent laws establishing that, by accepting a driver's license, a motorist has presumptively agreed to submit to a chemical test following an arrest for drunk driving. *Id.* States can and do impose an array of civil penalties if a driver revokes his or her consent and declines to submit to a chemical test; suspending a driver's license for one year as "a penalty for refusing to take a blood-alcohol test," for example, "is unquestionably legitimate, assuming appropriate procedural protections." *South Dakota* v. *Neville*, 459 U.S. 553, 560 (1983).

But those regulatory penalties are a far cry from criminalizing the assertion of one's Fourth Amendment right—with all of its attendant punitive and collateral consequences. *See, e.g.*, *Spencer* v. *Kemna*, 523 U.S. 1, 8-9 (1998) (enumerating some potential collateral consequences of criminal convictions, including eligibility to vote, to serve on a jury, to serve in the military, to receive government benefits, and, for some noncitizens, to remain in the United

States at all). A State cannot bridge that constitutional gulf by asserting that motorists have irrevocably consented, before the fact, to a bodily search as a condition of obtaining their driver's licenses. Yet that is just what the respondent States have tried to do through the implied-consent laws linked to their criminal statutes. *See* Minn. Stat. § 169A.51(1), (2)(a)(2) ("Any person who drives, operates, or is in physical control of a motor vehicle within this state * * * consents * * * to a chemical test of that person's blood, breath, or urine," and "the person must be informed * * * that refusal to take a test is a crime * * * ."); N.D. Cent. Code § 39-20-01(1), (3)(a) ("Any individual who operates a motor vehicle * * * in this state is deemed to have given consent, and shall consent, * * * to a chemical test, or tests, of the blood, breath, or urine," and "[t]he law enforcement officer shall inform the individual * * * that refusal to take the test * * * is a crime * * * ."). And that is precisely what the States now appear to argue before this Court. *See Birchfield* Br. in Opp. 14 ("Birchfield * * * would first have to show he has a constitutional right to refuse the test even after he impliedly consented to it when he obtained his driver's license."). That premise is fundamentally mistaken. To satisfy the Fourth Amendment, consent to a search must be voluntarily given, not waived *ex ante* as a clandestine rider attached to receipt of a license. Indeed, the notion of blanket future consent is a peculiar concept—which is why this Court already has declined to countenance the idea.

As this Court recently explained, a decision to give or withhold consent to a search at one moment does not remain fixed for all time, or even for an indeterminate but arguably "reasonable" time. *See Fernan-*

dez v. *California*, 134 S. Ct. 1126, 1135-36 (2014). Consent to a search must ultimately be given willingly in each case, and whether a manifestation of consent was voluntary or coerced depends on the particular facts. *See Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1973). A state statute cannot compel a person to consent to all future searches of a certain type—nor, equally, can a statute criminalize the act of revoking some prior consent.

The Fourth Amendment's "requirement of a 'voluntary' consent reflects a fair accommodation of the constitutional requirements involved." *Id.* at 229. By using criminal penalties to enforce a system of all-purpose "implied" consent, the respondent States have undone that constitutional bargain. Consent to a search, this Court has stressed, must "not be coerced, by explicit or implicit means, by implied threat or covert force." *Id.* at 228. Nor may consent be "granted only in submission to a claim of lawful authority." *Id.* at 233. Subtle but nevertheless unjustified intrusions on a constitutional right are still constitutional violations. *Id.* at 228 (" 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.' " (quoting *Boyd* v. *United States*, 116 U.S. 616, 635 (1886))). Here, the threat of ensuing criminal sanctions is hardly understated: officers are *required* to tell the individual that refusing the test is a crime. *See* Minn. Stat. § 169A.51(2)(a)(1)-(2); N.D. Cent. Code § 39-20-01(3)(a).

2. Licenses may come with certain conditions attached, to be sure. To acquire and maintain a li-

cense, a person must have proper qualifications and uphold a standard of behavior germane to the privilege the license affords. Lawyers must not lie to courts; doctors must not abuse their patients; motorists must not drive drunk. This Court has accordingly ruled that states may attach a condition to a license requiring consent to a requested search; if the motorist later withdraws consent, the consequence is revocation of the license. *See McNeely*, 133 S. Ct. at 1566. And that consequence can be significant. Driving is a vital part of daily life for many people in the United States. It often is required to maintain a job, to visit friends and family, and to obtain basic necessities—arguably all the more so in much of Minnesota and North Dakota. *See, e.g.*, Brian McKenzie, U.S. Census Bureau, *Who Drives to Work? Commuting by Automobile in the United States: 2013*, at 1 (2015).

But the States may not justify a criminal penalty as a licensing requirement. There is a difference between regulatory schemes and penal ones. *See, e.g.*, *Smith* v. *Doe*, 538 U.S. 84, 97-106 (2003) (applying the factors delineated in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), for demarcating criminal punishments). Under the unconstitutional conditions doctrine, which "prevent[s] the government from coercing people into" relinquishing their rights, even *regulatory* conditions attached to discretionary programs will not survive if they improperly coerce the waiver of constitutional rights. *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013); *see Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (condition on a benefit "impermissible" where it "would allow the government to 'produce a result which [it] could not com-

mand directly'" (alteration in original) (quoting *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958))); *cf. Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006). While this Court has observed that such regulatory conditions are permissible with respect to blood-alcohol tests, *see McNeely*, 133 S. Ct. at 1566, on the spectrum of license conditions from permissible to coercive, it is simply not a close question that *criminalizing* one's failure to satisfy a license condition as the consequence of refusing a warrantless search is over the line. *See Koontz*, 133 S. Ct. at 2598 (forbidding governmental "pressure" to relinquish a constitutional right).

A State cannot evade the Fourth Amendment through statutory contrivances. And it cannot make a wholesale abandonment of a constitutional right a condition of holding a driver's license.

CONCLUSION

For the foregoing reasons, and those in petitioners' briefs, the judgments below should be reversed.

Respectfully submitted,

CATHERINE E. STETSON
Counsel of Record
DANIEL J.T. SCHUKER
ANDREW D. SELBST
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491
cate.stetson@hoganlovells.com

STEVEN R. SHAPIRO
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, N.Y. 10004
(212) 549-2500

Counsel for Amicus Curiae

February 2016

Nos. 14-1470, 14-1468, 14-1507

SUPREME COURT, U.S.
FILED
MAR 16 2016
OFFICE OF THE CLERK

In The
Supreme Court of the United States

WILLIAM ROBERT BERNARD, JR.,

Petitioner,

v.

STATE OF MINNESOTA

DANNY BIRCHFIELD,

Petitioner,

v.

STATE OF NORTH DAKOTA

STEVE MICHAEL BEYLUND,

Petitioner,

v.

GRANT LEVI, DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION.

On Writs Of Certiorari To The Supreme Court Of The State Of Minnesota And The Supreme Court Of The State Of North Dakota

BRIEF OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

MARK ZAHNER
Chief Executive Officer
CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION
921 11th Street
Suite 300
Sacramento, CA 95814

MICHAEL J. YRACEBURN*
COUNTY OF KERN
1215 Truxtun Ave.
Bakersfield, CA 93301
(661) 868-2321
myraceburn@co.kern.ca.us

STEWART HICKS
TRAFFIC SAFETY RESOURCE PROSECUTOR

**Counsel of Record*

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

A. Implied Consent Laws are not coercive, and the consent derived therefrom may be considered to be actual consent 4

B. Implied Consent Laws in California 14

C. The imposition of sanctions is not an impermissible penalty on the exercise of the Fourth Amendment 17

(1) The conditions reasonably relate to the purposes sought by the legislation which confers the benefit 22

(2) The value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights 23

(3) There are no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit 26

D. Is there a due process argument here for how the scheme is implemented? 30

CONCLUSION 36

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Cozens, (1976) 60 Cal.App.3d 130, 131 Cal.Rptr. 256 ..... 23, 24

Escobedo v. State of California (1950) 35 Cal.2d 870, 222 P.2d 1 22

Fernandez v. California (2014) 571 U.S. ___, 134 S.Ct. 1126 5

Florida v. Bostwick (1991) 501 U.S. 429 6

Griffin v. California (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 30

Hernandez v. Department of Motor Vehicles, (1981) 30 Cal.3d 70, 177 Cal.Rptr. 566, 634 P.2d 917 ..... 22, 23

Hill v. Nat'l Collegiate Athletic Ass'n, (1994) 7 Cal.4th 1 18

Ingersoll v. Palmer, (1987) 43 Cal.3d 1321 17

Koontz v. St. Johns River Water Management Dist., (2013) 133 S.Ct. 2586 19

Lebrilla v. Farmers Group, Inc. (2004) 119 Cal.App.4th 1070, 16 Cal.Rptr.3d 25 26

Mackey v. Montrym (1979) 443 U.S. 1 ..... 22, 23

McGlothen v. Department of Motor Vehicles, (1977) 71 Cal.App.3d 1005, 140 Cal.Rptr. 168 ..... 20, 30

Missouri v. McNeely (2013) 568 U.S. ___, 133 S.Ct. 1552 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

People v. Agnew, (2015) 242 Cal.App.4th Supp. 1, 195 Cal.Rptr.3d 486 .....13, 20, 29, 35

People v. Hagedorn (2005) 127 Cal.App.4th 734, 25 Cal.Rptr.3d 879 33

People v. Harris (2015) 234 Cal.App.4th 671, 184 Cal.Rptr.3d 198, review denied (June 10, 2015) 17, 35

People v. Superior Court (Hawkins) (1972) 6 Cal.3d 757, 493 P.2d 1145, 100 Cal.Rptr. 281 .....23, 24

Rios v. Cozens (1972) 7 Cal.3d 792, 103 Cal.Rptr. 299, 499 P.2d 979 22

Ritschel v. City of Fountain Valley (2006) 137 Cal.App.4th 107, 40 Cal.Rptr.3d 48 .....34, 35

Robbins v. Superior Court, (1985) 38 Cal.3d 199, 695 P.2d 695, 211 Cal.Rptr. 398.....18, 19, 21

Sanchez v. County of San Diego, (9th Cir. 2006) 464 F.3d 916 .....18, 19

Schmerber v. California (1966) 384 U.S. 757 ....2, 4, 20

Schneckloth v. Bustamonte (1973) 412 U.S. 218 .....5, 6, 32

Smith v. Los Angeles County Bd. of Supervisors, (2002) 104 Cal.App.4th 1104.....18

South Dakota v. Neville (1983) 459 U.S. 553 ....*passim*

TABLE OF AUTHORITIES – Continued

Page

State v. Chasingbear (Minn. Ct. App., Aug. 4, 2014, A14-0301) 2014 WL 3802616, review granted (Oct. 14, 2014), revew denied (Apr. 14, 2015) 26, 29, 30

U.S. v. Sugiyama (2015) 113 F.Supp.3d 784 ..... 9, 12, 13

United States v. Harrington (9th Cir. 2014) 749 F.3d 825 33

United States v. Watson (1976) 423 U.S. 411 5

CONSTITUTION

U.S. Const. amend. IV ..... *passim*

U.S. Const. amend. V 6, 27, 30, 31

California Constitution, article I, §13 ..... 17, 18

STATUTES & REGULATIONS

18 U.S.C. §3118 ..... 9, 10, 11, 12

36 C.F.R. §4.23 ..... 9, 10

California Vehicle Code §§4000 to 9564 25

California Vehicle Code §§12500 to 15312 25

California Vehicle Code §12810.5 25

California Vehicle Code §13353 ..... 15, 16, 23, 24, 36

California Vehicle Code §§21070 to 23336 ..... 15, 21, 25

California Vehicle Code §22356(a) 22

California Vehicle Code §23612 ..... *passim*

Cal. Rules of Court, Rule 8.1555 26

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

California DMV Driver Handbook, 2016 ..... 14, 15

http://www.ford.com/cars/taurus/specifications/view-all 22

https://www.dmv.ca.gov/portal/dmv/dmv/dmvhomes/dmvnews 30

Light Automotive Technology, Carbon Dioxide Emissions, and Fuel Economy Trends, 1975 Through 2014, U.S. Environmental Protection Agency, EPA-420-S-14-001, October 2014 8

TREATISES

9 Witkin, California Procedure (4th ed. 1997) Appeal, §940 26

STATEMENT OF INTEREST[1]

The California District Attorneys Association as amicus curiae hereby seeks permission to file the enclosed amicus curiae brief in support of Respondent in the consolidated cases.

The California District Attorneys Association (CDAA) is the statewide organization of California prosecutors. CDAA is a professional organization that has been in existence for over 91 years, and was incorporated as a nonprofit public benefit corporation in 1974. CDAA has over 2,800 members, including elected and appointed district attorneys, the Attorney General of California, city attorneys principally engaged in the prosecution of criminal cases, and attorneys employed by these officials. The association presents prosecutors' views as amicus curiae in appellate cases when it concludes that the issues raised in such cases will significantly affect the administration of criminal justice.

---

[1] Pursuant to Rule 37.2(a), amicus gave counsel of record for each party written notice of the intention of amicus to file this brief at least 10 days in advance, and all parties have consented in writing to the filing of this brief. Pursuant to Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and that no entity or person, other than amicus, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief.

These cases not only raise matters of concern for prosecutors and law enforcement professionals nationwide, they specifically present issues of national and statewide concern to prosecutors. California, like all other states, has an implied consent law with a similar statutory scheme to both Minnesota and North Dakota. The lower courts have been consistent in their rulings as to the constitutionality of such driving-consent statutory schemes. A decision by this Court will reaffirm that uniform rule and provide finality to the issue.

Your amicus is familiar and experienced with the issues presented here, specifically with the prosecution of cases where evidence of impairment is obtained by California law enforcement agencies pursuant to statutory scheme that requires motorists to submit to a chemical test of their bodily fluids.

SUMMARY OF ARGUMENT

California has a long history with the issue now confronting the Court, dating to *Schmerber v. California* (1966) 384 U.S. 757, and has crafted its laws in response to the direction of this Court. It is clear that the scourge on the roads of America has not abated in the years since *Schmerber*. Still, the advance consent laws and the choice they provide impaired drivers has been a tailored response by the States, including California, to mitigate the damage done by impaired drivers in the most reasonable way.

A. The exception to the Fourth Amendment requirement of obtaining a search warrant is met if there is consent based on the totality of the circumstances. One of the factors to consider in those circumstances is the existence of the advanced consent that is required of all drivers on the roads of California. Once confronted with the choice of providing a sample for testing, the factors surrounding that consent should be considered as well. The fact that if the impaired driver refuses, there will be negative consequences, does not render the asking for the consent at the time of the detention, coercive.

B. The advanced consent statutes, on their face, do not impermissibly burden a constitutional right. The conditions reasonably relate to the purposes sought by the legislation which confers the benefit, giving the driver a choice when that driver is suspected of driving impaired. The public value of those conditions manifestly outweighs any resulting imposition on the driver, as the havoc caused by impaired drivers is well recognized and its prevention is of high interest to a state. Finally, there are no alternative means imposing less on the driver that can be narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit. Should petitioner's position prevail, the real alternative is to effectively negate implied

consent laws by taking the choice away from the impaired driver and having a search warrant in every investigation.

C. Once the suspected impaired driver has been confronted with his choice, his Due Process rights are fully protected. Built into the statutory scheme is the very requirement of notice. Upon that notification, the impaired driver makes his or her choice. Once made, even if the consent is withdrawn, the impaired driver has multiple procedural avenues open to him to ensure that, if appropriate, his privilege to drive is restored.

ARGUMENT

A. Implied Consent Laws are not coercive, and the consent derived therefrom may be considered to be actual consent.

On two occasions, this Court has addressed whether a warrantless blood test in a driving under the influence case violated the Fourth Amendment. In *Schmerber v. California* (1966) 384 U.S. 757, this Court concluded "compulsory administration of a blood test" was a search under the Fourth Amendment. (*Id.*, at 767.) Nevertheless, the Court concluded that the warrantless search was justified when there are exigent circumstances. (*Id.*, at 770-771.)

More recently, in *Missouri v. McNeely* (2013) 568 U.S. ___, 133 S.Ct. 1552, this Court held that the sole

factor of the natural dissipation of alcohol in the bloodstream alone does not create exigent circumstances in every DUI case. (*Id.*, at 1563.) The Court went on to state that a search warrant should generally be obtained (*Id.*, at 1561), and where exigent circumstances exist, they must be demonstrated by the totality of the circumstances. (*Id.*, at 1563.) The *McNeely* Court had no occasion to determine whether there exists another exception that would justify a warrantless search under the Fourth Amendment.

With few exceptions, searches conducted without warrants are considered "unreasonable" under the Fourth Amendment. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 219.) Moreover, it is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." (*Ibid.*) "A search to which an individual consents meets Fourth Amendment requirements. . ." (*Fernandez v. California* (2014) 571 U.S. ___, ___, 134 S.Ct. 1126, 1137.) In order for consent to be considered valid, it must be demonstrated to be the result of a "free and unconstrained choice." (*Id.*, at 225.) When the State seeks to justify a search based on actual consent, it must "demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." (*Schneckloth*, 412 U.S. at 248.) The fact that a defendant has been arrested at the time of the search does not render a suspect's consent coerced. (*United States v. Watson* (1976) 423 U.S. 411.) However, consent that amounts to nothing

more than submission to police intimidation is not voluntary. (*Florida v. Bostwick* (1991) 501 U.S. 429.) Whether consent is voluntary or involuntary is determined in a case-by-case basis and is based on the totality of the circumstances. (*Schneckloth*, 412 U.S. at 219.)

"We recognize, of course, that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices. [Citation.] We hold, therefore, that a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer. . . ." (*South Dakota v. Neville* (1983) 459 U.S. 553, 564.) While *Neville* concerned the Fifth Amendment right against self-incrimination, the rationale equally applies to a Fourth Amendment analysis. Consent is neither coerced nor involuntary simply because the individual is faced with a difficult choice.

Additionally, in *McNeely*, this Court did not rule that implied consent laws were forever abrogated by the requirement for a warrant. On the contrary, the Court noted that even in light of its holding, states continue to have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless *nonconsensual* blood draws.

> For example, all 50 States have adopted *implied consent laws* that require motorists, as a condition of operating a motor vehicle

> within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. [Citation.] Such laws impose significant consequences *when a motorist withdraws consent*; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.

(*McNeely*, 568 U.S. at 1566, emphasis added.)

Thus, this Court recognized that states such as California would be able to continue to enforce their implied consent laws. Furthermore, this Court acknowledged that it is the *withdrawal of consent* that creates the necessity for a warrant, and it is the *withdrawal of consent* that raises the possibility of unpleasant consequences.

The Petitioner in *Birchfield*, on behalf of all petitioners, refers to implied consent laws as "compelled-consent" laws (Petitioners' brief, *Birchfield*, at 30.). Petitioners argue that "the suggestion that all drivers on North Dakota's roads *actually* consent to warrantless chemical tests is nonsensical. To begin with, there is nothing 'voluntary' about the statutory scheme." (Petitioners' brief, *Birchfield*, at 9, 21-22.) The essence of Petitioners' argument against the concept that implied consent laws may be considered to be actual consent is as follows.

> There is no basis to believe that motorists understand that they have granted consent

> to be tested simply by virtue of driving in North Dakota. And given the practical necessity of driving to carry out the essential activities of daily life, consent obtained upon threat of losing the ability to drive surely is the product of duress or coercion.

(Petitioners' brief, *Birchfield*, at 9-10.)

Petitioners mischaracterize the nature of the law[2] by referring to it as "compelled consent." Petitioners completely ignore the fact that driving a motor vehicle on a public highway, exposing persons and property to a machine with a current average weight of approximately two tons,[3] is a privilege, and the exercise of that privilege requires that the individual agrees in advance to certain conditions that ensure the safe exercise of that privilege.

Petitioners suggest that, due to the vicissitudes of daily life, they cannot survive without driving, that petitioners were somehow *compelled* to choose to obtain a license to drive, *compelled* to exercise the privilege to drive on the state's highways, *compelled* to consume alcohol and/or drugs, and then *compelled-coerced-forced* to submit to a chemical test. Moreover,

---

[2] As to the statutory design in California, one need only examine footnotes 7, 8, and 9 to see that drivers in California are well-advised and have no excuse for claiming a lack of knowledge of their consent to give blood or breath samples in exchange for the privilege to drive.

[3] Light Automotive Technology, Carbon Dioxide Emissions, and Fuel Economy Trends, 1975 Through 2014, U.S. Environmental Protection Agency, EPA-420-S-14-001, October 2014.

Petitioners Birchfield and Beylund appear to suggest that due to the rural nature of North Dakota, that they should be granted special dispensation.[4]

Reality flies in the face of this argument. These are called choices, and millions of people in this country choose every day not to obtain licenses to drive, not to drive, and not to consume alcohol and/or drugs prior to driving. Drivers simply agree in advance to consent to give blood or breath samples in exchange for the privilege of driving on the roads of the state. After being arrested for driving under the influence, drivers are neither compelled nor coerced to give blood or breath samples after having given consent to such tests at the time of the acquisition of a license to drive.

In *U.S. v. Sugiyama* (2015) 113 F.Supp.3d 784, the United States District Court considered the Federal statutory design for driving under the influence on Federal property. The suspect in *Sugiyama* crashed her vehicle on the "Baltimore-Washington Parkway, which is in the special maritime and territorial jurisdiction of the United States." (*Id.*, at 786.) Accordingly, the provisions of 36 C.F.R. §4.23 and 18

---

[4] Is it possible that Petitioners are suggesting a "rural" exception to implied consent laws? Should all drivers in all rural areas of even the most populous states, such as California, be exempt from such laws because they cannot survive without driving?

U.S.C. §3118 applied.[5] It is significant that the Federal statutes are very similar to the statutes of many

---

[5] 36 C.F.R. §4.23 provides:

(a) Operating or being in actual physical control of a motor vehicle is prohibited while:

(1) Under the influence of alcohol, or a drug, or drugs, or any combination thereof, to a degree that renders the operator incapable of safe operation; or

(2) The alcohol concentration in the operator's blood or breath is 0.08 grams or more of alcohol per 100 milliliters of blood or 0.08 grams or more of alcohol per 210 liters of breath. Provided however, that if State law that applies to operating a motor vehicle while under the influence of alcohol establishes more restrictive limits of alcohol concentration in the operator's blood or breath, those limits supersede the limits specified in this paragraph.

(b) The provisions of paragraph (a) of this section also apply to an operator who is or has been legally entitled to use alcohol or another drug.

(c) Tests.

(1) At the request or direction of an authorized person who has probable cause to believe that an operator of a motor vehicle within a park area has violated a provision of paragraph (a) of this section, *the operator shall submit to one or more tests of the blood, breath, saliva or urine for the purpose of determining blood alcohol and drug content.*

(2) *Refusal by an operator to submit to a test is prohibited and proof of refusal may be admissible [sic] in any related judicial proceeding.*

(Continued on following page)

(3) Any test or tests for the presence of alcohol and drugs shall be determined by and administered at the direction of an authorized person.

(4) Any test shall be conducted by using accepted scientific methods and equipment of proven accuracy and reliability operated by personnel certified in its use.

(d) Presumptive levels.

(1) The results of chemical or other quantitative tests are intended to supplement the elements of probable cause used as the basis for the arrest of an operator charged with a violation of paragraph (a)(1) of this section. If the alcohol concentration in the operator's blood or breath at the time of testing is less than alcohol concentrations specified in paragraph (a)(2) of this section, this fact does not give rise to any presumption that the operator is or is not under the influence of alcohol.

(2) The provisions of paragraph (d)(1) of this section are not intended to limit the introduction of any other competent evidence bearing upon the question of whether the operator, at the time of the alleged violation, was under the influence of alcohol, or a drug, or drugs, or any combination thereof.

18 U.S.C. §3118 provides:

(a) Consent. – *Whoever operates a motor vehicle in the special maritime and territorial jurisdiction of the United States consents thereby to a chemical test or tests of such person's blood, breath, or urine, if arrested for any offense arising from such person's driving while under the influence of a drug or alcohol in such jurisdiction.* The test or tests shall be administered upon the request of a police officer having reasonable grounds to believe the person arrested to have been driving a motor vehicle upon the special maritime and

(Continued on following page)

states.[6] Defendant argued that the charge of refusing to submit to a chemical test must be dismissed because the refusal statute is unconstitutional under the Fourth Amendment and that to criminalize a refusal to consent to a search is a violation of the Fourth Amendment. (*Id.*, at 786-787.) Defendant further argued that consent is coerced when the officer informs the suspect that taking the test is mandatory, and that a refusal is a criminal act. (*Id.*, at 791.) The Court noted that defendant had not cited

---

territorial jurisdiction of the United States while under the influence of drugs or alcohol in violation of the laws of a State, territory, possession, or district.

(b) Effect of Refusal. – *Whoever, having consented to a test or tests by reason of subsection (a), refuses to submit to such a test or tests, after having first been advised of the consequences of such a refusal, shall be denied the privilege of operating a motor vehicle upon the special maritime and territorial jurisdiction of the United States during the period of a year commencing on the date of arrest upon which such test or tests was refused*, and such refusal may be admitted into evidence in any case arising from such person's driving while under the influence of a drug or alcohol in such jurisdiction. Any person who operates a motor vehicle in the special maritime and territorial jurisdiction of the United States after having been denied such privilege under this subsection shall be treated for the purposes of any civil or criminal proceedings arising out of such operation as operating such vehicle without a license to do so.

18 U.S.C. §3118 (emphasis added).

[6] See the discussion of the California Implied Consent Laws.

any case, federal or state, that has held that a test-refusal statute is unconstitutional, and the Court held that "Defendant's assertion that a defendant's consent is coerced when he is informed of the criminal consequences of refusing chemical testing thus is unavailing." (*Id.*, at 795.)

A more accurate characterization of implied consent laws is to refer to them as *advance consent* laws.[7] In advance of driving, and in exchange for exercising the privilege of driving on a state's roadways, individuals give *advance consent* to supply blood or breath samples should an officer have probable cause to believe that they were driving while impaired by alcohol and/or drugs. Moreover, the *consequences* for the failure to supply a sample are *predetermined* and well known before the individual begins to drive. The driver may choose to furnish the sample or choose the consequences. The California "implied consent" laws are an excellent example of what is better characterized as "advance consent" laws.

---

[7] Amicus would suggest to the Court that the Honorable Judge Charello of the Superior Court of the County of Santa Clara more aptly defines this category of laws as "advanced consent." (See *People v. Agnew*, (2015) 242 Cal.App.4th Supp. 1, 195 Cal.Rptr.3d 486.)

B. Implied Consent Laws in California

Advance consent by drivers in California[8] (as in many other states and similar to the Federal statutes), is given at the time of the issuance and receipt of a license to drive and when the driver begins to exercise their privilege to drive.[9] There is no coercion at this point in time. Drivers may *choose* not to exercise the privilege to drive with its attendant obligations. However, if the individual *chooses* to exercise the privilege to drive, they do so on condition that should they ever be *arrested* for driving under the influence (impaired driving), they will be required to submit to a blood or breath test.

---

[8] California Vehicle Code section *"23612(a)(1)(A): A person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood, if lawfully arrested for an offense allegedly committed in violation of [various DUI statutes]."*

[9] The California DMV Driver Handbook provides the following information to every potential driver: *"When you drive in California, you consent to have your breath, blood or, under certain circumstances, urine tested if you are arrested for DUI of alcohol, drugs, or a combination of both." In addition, the following question is frequently asked on the drivers license exam. "You consent to take a chemical test for the alcohol content of your blood, breath, or urine: a. Only if you have been drinking alcohol b. Whenever you drive in California c. Only if you have a collision."* (California DMV Driver Handbook, 2016, at 86, 103. b. is listed as the correct answer).

Accordingly, when the individual is arrested for driving under the influence in California, the admonition[10] read by the officer to the suspect acts merely as a *reminder of the consent previously given*. Nevertheless, the individual is still not without options. The driver may *withdraw* consent, thereby exercising the option to choose to refuse to take a chemical test, thus choosing the unpleasant option (*Neville*, 459 U.S. at 564) of losing their license to drive for a specified

---

[10] A number of California Vehicle Code sections (e.g., CVC sections 23612, 13353) relate the nature of the officer's admonition. The California DMV Driver Handbook summarizes them as follows:

When you drive in California, you consent to have your breath, blood or, under certain circumstances, urine tested if you are arrested for DUI of alcohol, drugs, or a combination of both.

If arrested, the officer may take your DL, issue you a temporary DL for 30 days, and give you an order of suspension. You may request a DMV administrative hearing within 10 days. The arresting officer may require you to submit to either a breath or blood test. You do not have a right to consult with a lawyer before selecting or completing a test.

If your BAC is 0.08% or higher, the peace officer may arrest you (CVC §§23152 or 23153). If the officer reasonably believes you are under the combined influence of alcohol and drugs, and you have already submitted to a preliminary alcohol screening (PAS) and/or breath test, you may still be required to submit to a blood or urine test because the breath test does not detect the presence of drugs.

If you refuse to submit to the required blood and/or urine test(s), your driving privilege may be suspended because of your refusal. Even if you change your mind later, your driving privilege may be suspended for both reasons, although both actions will run concurrently. (California DMV Driver Handbook, 2016, at 86).

period of time.[11] In California, the option remains for the individual to have a hearing where they may be able to have their license returned with no further ramifications to their privilege to drive.[12] Should the driver choose to take the chemical test, they may be immediately exonerated or they may face the possibility of having a jury determine their fate. In either situation, it is the choice of the individual. This is the view held by the California courts:

> We agree with *Brooks* and *Moore* that a motorist's submission to a chemical test, if freely and voluntarily given, is actual

---

[11] California Vehicle Code section 23612(d) provides: ***The person shall be told*** *that his or her failure to submit to, or the failure to complete, the required chemical testing will result in a fine, mandatory imprisonment if the person is convicted of a violation of [specified DUI laws] and (i) the suspension of the person's privilege to operate a motor vehicle for a period of one year, (ii) the revocation of the person's privilege to operate a motor vehicle for a period of two years if the refusal occurs within 10 years of a separate violation of [specified DUI laws] that resulted in a conviction, or if the person's privilege to operate a motor vehicle has been suspended or revoked pursuant to [California Vehicle Code sections] for an offense that occurred on a separate occasion, or (iii) the revocation of the person's privilege to operate a motor vehicle for a period of three years if the refusal occurs within 10 years of two or more separate violations of [specified DUI offenses], or any combination thereof, that resulted in convictions, or if the person's privilege to operate a pursuant to [specified California Vehicle Code sections] for offenses that occurred on separate occasions, or if there is any combination of those convictions, administrative suspensions, or revocations.* [emphasis added]

[12] California Vehicle Code section 13353(e).

> consent under the Fourth Amendment. That the motorist is forced to choose between submitting to the chemical test and facing serious consequences for refusing to submit, pursuant to the implied consent law, does not in itself render the motorist's submission to be coerced or otherwise invalid for purposes of the Fourth Amendment.

(*People v. Harris* (2015) 234 Cal.App.4th 671, 689, 184 Cal.Rptr.3d 198, 212-13, *review denied* (June 10, 2015).)

Amicus is requesting this Court to find that statutory designs such as those utilized by the State of California continue to be a valid means by which to regulate drivers who are driving while impaired by alcohol and/or drugs, that individuals who choose to drive give actual, advance consent to give blood or breath samples upon request by a peace officer after a valid arrest, and that such advance consent is neither coerced nor involuntary.

C. The imposition of sanctions is not an impermissible penalty on the exercise of the Fourth Amendment.

First, it must be remembered that in California, the standard is the same as the Federal standard:

> The California Supreme Court has made clear, however, that "[t]he touchstone for all issues under the Fourth Amendment and article I, section 13 of the California Constitution is reasonableness. *Ingersoll v. Palmer*,

> (1987) 43 Cal.3d 1321, [cit. omitted]. This language indicates that the right to be free from unreasonable searches under Art. I §13 of the California Constitution parallels the Fourth Amendment inquiry into the reasonableness of a search. *See, e.g., Smith v. Los Angeles County Bd. of Supervisors*, (2002) 104 Cal.App.4th 1104 [cit. omitted] (applying the Supreme Court's "special needs" rationale and *Wyman* to deny a similar challenge to a Los Angeles County welfare eligibility verification program arising under the state *and* federal constitutions); *see also Hill v. Nat'l Collegiate Athletic Ass'n*, (1994) 7 Cal.4th 1, [cit. omitted] ("The 'privacy' protected [under state law] is no broader in the area of search and seizure than the 'privacy' protected by the Fourth Amendment or by article I, section 13 of the California Constitution.").

(*Sanchez v. County of San Diego*, (9th Cir. 2006) 464 F.3d 916, 928-929.)

California law further mirrors Federal law on the unconstitutional conditions doctrine. The California Supreme Court has explained the "receipt of a public benefit is conditioned upon the waiver of a constitutional right, the government bears a heavy burden of demonstrating the practical necessity for the limitation." (*Robbins v. Superior Court*, (1985) 38 Cal.3d 199, 213, 695 P.2d 695, 211 Cal.Rptr. 398.) Under the unconstitutional conditions doctrine, the governmental entity seeking to impose such a condition must establish that:

> (1) the conditions reasonably relate to the purposes sought by the legislation which confers the benefit;
>
> (2) the value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights; and
>
> (3) there are no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit.

(*Ibid.*)

Petitioners misstate this rule. (See Pet. Birchfield Brief, pg. 40.) They add further requirements of a "nexus" and "rough proportionality" (citing, *Koontz v. St. Johns River Water Management Dist.*, (2013) 133 S.Ct. 2586, 2595.) However, as *Koontz* itself makes clear, those requirements are clearly confined to the law of land use and governmental permitting. (*Id.*, at 2599) Amicus urges this Court to agree with the bounds set by *Robbins*, 38 Cal.3d at 213.

As a threshold issue, petitioner " . . . alleging a violation of the unconstitutional conditions doctrine, however, must first establish that a constitutional right is infringed upon." (*Sanchez*, 464 F.3d at 931.)

Petitioners argue that the so-called "implied consent"[13] laws impose a penalty for exercising the right to be free from unreasonable searches. (Pet. Beylund, pg. 7.) It is undisputed that a search of a person's body, which should include a bodily sample, is a search. That really was the point that the court made in *Schmerber* and reaffirmed in *McNeely*.

In California (as in all the other states) driving is not a fundamental right. *McGlothen v. Department of Motor Vehicles*, (1977) 71 Cal.App.3d 1005, 1021, 140 Cal.Rptr. 168, reiterated that simple concept: "The right to drive a motor vehicle on the public highways is not such a fundamental right as to require strict scrutiny of any law which appears to classify the driving privileges of persons otherwise similarly situated, and to necessitate a compelling state interest before such classification may be justified."

California, along with the other states, is saying – to drive on the public road, you must consent in advance to have your bodily fluids tested to determine if you are impaired, provided the peace officer has probable cause to detain you for driving impaired. If a person withdraws that advanced consent, certain consequences will flow. The granting of the privilege of driving, which is not a right, need be conditioned on giving up the protection of the Fourth Amendment.

---

[13] (*People v. Agnew*, 242 Cal.App.4th Supp. 1, 195 Cal.Rptr.3d 486, 491.)

This Court has already answered that question when a refusal to provide a sample occurs, and the answer is "no." Clearly, if an impaired[14] driver refuses to comply with the peace officer's request to provide a bodily sample for testing to determine what he is impaired by, a warrant is required – unless exigent circumstances can be articulated or some other recognized exception to the warrant requirement found. "Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." (*McNeely*, 133 S.Ct. at 1563.)

So does the advance consent statute act as a reasonable exception, justifying a warrantless blood sample? And if so, does this advance consent statute create an unconstitutional condition? It seems clear, as discussed *ante*., that consent is a reasonable exception to the search warrant requirement when all the circumstances are taken into account, especially in the context of driving, which is again a privilege and not a right. Further, analyzing the unconstitutional conditions doctrine pursuant to *Robbins*, 38 Cal.3d 199, we arrive at the same conclusion: criminal penalties for refusing a chemical test in the context of driving while impaired are constitutionally proper.

---

[14] Impaired driver means anyone operating a motor vehicle while under the influence of a drug or alcohol. (See Cal. Veh. Code §23152.)

(1) The conditions reasonably relate to the purposes sought by the legislation which confers the benefit.

Like this Court, in *Mackey v. Montrym* (1979) 443 U.S. 1, 17-18, California has long recognized its vital interest in public safety and the extreme hazard impaired drivers pose. "Over 30 years ago, in *Escobedo v. State of California* (1950) 35 Cal.2d 870, 222 P.2d 1 (overruled on other grounds in *Rios v. Cozens* (1972) 7 Cal.3d 792, 103 Cal.Rptr. 299, 499 P.2d 979), our court while acknowledging the great importance of driving at the same time explicitly emphasized that 'it is well established that usage of the highways is subject to reasonable regulation for the public good.'" (*Hernandez v. Department of Motor Vehicles*, (1981) 30 Cal.3d 70, 78-79, 177 Cal.Rptr. 566, 570, 634 P.2d 917, 921.)

A common Ford Taurus has a curb weight of 4,175 pounds.[15] The maximum speed allowed in California is 70 miles per hour. (Cal. Veh. Code §22356(a).) The destruction caused by a two-ton object propelled at that speed in the hands of an impaired driver is clearly of great concern to the state.

The advanced consent law is one reasonable regulation California has enacted to protect the public good in the usage of the public roads. The California Supreme Court has called the advance consent law, the "paradigm example of a classic

---

[15] http://www.ford.com/cars/taurus/specifications/view-all/.

'health and safety' police power measure, clearly enacted by the Legislature to foster the safety of the public in the use of the state's highways." (*Hernandez*, 30 Cal.3d at 76.) "In enacting the initial advance consent law, 'the Legislature sought to obviate these consequences for the driver and 'avoid the possible violence which could erupt if forcible tests were made upon a recalcitrant and belligerent inebriate' [citation], while at the same time preserving the state's strong interest in obtaining the best evidence of the defendant's blood alcohol content at the time of the arrest.'" (*Hernandez*, 30 Cal.3d at 77, 1, quoting *Anderson v. Cozens*, (1976) 60 Cal.App.3d 130, 143, 131 Cal.Rptr. 256.)

(2) The value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights.

The imposition of this sanction does not outweigh the impairment of the constitutional right given the multiple purposes achieved. (*Mackey*, 443 U.S. at 18.) As part of the advance consent law, a person arrested for drunk driving is required to submit to a test for intoxication, or that person will lose his automobile driver's license. (Cal. Veh. Code §§13353 & 23612.)

The California Legislature recognized that "such an episode remains an unpleasant, undignified and undesirable one." (*People v. Superior Court* (*Hawkins*) (1972) 6 Cal.3d 757, 764, 493 P.2d 1145, 100 Cal.Rptr.

281.) In enacting California Vehicle Code section 13353, the Legislature sought to obviate these consequences for the driver and "avoid the possible violence which could erupt if forcible tests were made upon a recalcitrant and belligerent inebriate" (*Anderson*, 60 Cal.App.3d at 143), while at the same time preserving the state's strong interest in obtaining the best evidence of the defendant's blood alcohol content at the time of the arrest. "The Legislature devised an additional or alternative method of compelling a person arrested for drunk driving to submit to a test for intoxication, by providing that such person will lose his automobile driver's license for a period of six months if he refuses to submit to a test for intoxication. The effect of this legislation is to equip peace officers with an instrument of enforcement not involving physical compulsion." (*Hawkins*, 6 Cal.3d at 765.)

The California position has been recognized by this Court. The admonition, which informs the arrested person of the consequences of refusing the chemical test, is intended to encourage arrested motorists to take the required test, because "the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test." (*Neville*, 459 U.S. at 564.) The admonition therefore encourages consent to testing and reduces the need for forced blood draws, by informing arrested motorists of the serious consequences of refusing to test. (*See id.*, at 566, fn. 17 ("Since the State wants the suspect to submit to the

test, it is in its interest to fully warn suspects of the consequences of refusal.").)

The value accrued to California, or to any state, is simply control of its public roads and the safety of its citizens. According to the California Department of Transportation there are 394,787.46 miles of lanes for cars in California.[16] Vehicles in California traveled 329,174.25 million miles on those roads in 2013.[17] California clearly has a vested interest in setting conditions for individuals who may drive on the road.

Of course, driving on the roads of California is not unconstrained and it is very highly regulated by the state. A brief survey of the California Vehicle Code amply demonstrates that fact. There are over 4000 statutory sections. (See Cal. Veh. Code *et seq.*) It sets forth 5,564 sections on just how to register a vehicle in California. (See Cal. Veh. Code §§4000 to 9564.) It has 2,812 sections on licensing and its requirements. (See Cal. Veh. Code §§12500 to 15312.) Division 11, called the "Rules of the Road" spans from section 21070 to 23336, an additional 2,266 sections. Violations of these laws have penal consequences, everything from an infraction to a felony, as well as administrative consequences. (Cal. Veh. Code §12810.5.) This is the same point made in the Minnesota Court of Appeal when it said: "The short history and

---

[16] http://www.dot.ca.gov/hq/tsip/hpms/hpmslibrary/prd/2013prd/2013PublicRoadData.pdf.

[17] *Ibid.*

tradition of automobile regulation teach us that laws regulating automobile use have existed since their advent." (*State v. Chasingbear* (Minn. Ct. App., Aug. 4, 2014, A14-0301) 2014 WL 3802616, at 11, review granted (Oct. 14, 2014), review denied (Apr. 14, 2015).)[18]

Within this realm of constrained activity, it is not unreasonable to ask the driver to agree in advance to take a test to determine if they are safe to operate on the public roads.

(3) There are no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit.

As noted above, the alternate means to attain safety on the roads is for the officer to get a search warrant every time they detain a motorist who is suspected of impaired driving. (*McNeely*, 133 S.Ct. at 1563.) This Court has never required that, always looking to "the fact-specific nature of the reasonableness

---

[18] In California an unpublished opinion may not be cited or relied upon. (Cal. Rules of Court, Rule 8.1555.) This is only limited to California cases and decisions of the courts of other states can be cited if they are "persuasive depending on the point involved" (9 Witkin, California Procedure (4th ed. 1997) Appeal, §940, p. 980) (*Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070, 1077, 16 Cal.Rptr.3d 25, 31-32.)

inquiry." (*Id.*, at 1559.) The advance consent statutes are tailored to meet this reasonableness standard.

The fact that a motorist is told he will face serious consequences if he refuses to submit to a blood test does not, in itself, mean that his submission was coerced or that the search is unreasonable. As noted previously, this Court in *Neville* held that use of a defendant's refusal to submit to a chemical test as evidence in a DUI trial does not violate the defendant's Fifth Amendment privilege against self-incrimination. "'[T]he Fifth Amendment is limited to prohibiting the use of "physical or moral compulsion" exerted on the person asserting the privilege.'" (*Id.*, at 562.) "Here, the State did not directly compel respondent to refuse the test, for it gave him the choice of submitting to the test or refusing." (*Ibid.*) Although this Court recognized that in extreme situations the choice given to a suspect is no choice at all, such as when the blood is extracted in a manner "so painful, dangerous, or severe, or so violative of religious beliefs, that almost inevitably a person would prefer 'confession,'" this Court also held that "the values behind the Fifth Amendment are not hindered when the State offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him." (*Id.*, at 563.)

The respondent in *Neville* conceded that "[t]he simple blood-alcohol test is so safe, painless, and commonplace . . . that the State could legitimately compel the suspect, against his will, to accede to the test." (*Neville*, 459 U.S. at 563.) Therefore, because

"the offer of taking a blood-alcohol test is clearly legitimate," the court concluded that

> "the action becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice. Nor is this a case where the State has subtly coerced respondent into choosing the option it had no right to compel, rather than offering a true choice. To the contrary, the State wants respondent to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test."

(*Id.*, at 563-564.)

Finally, the court acknowledged that, although "the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make," the difficultly of the decision does not mean the motorist's ultimate choice is coerced. (*Id.*, at 564.) "[T]he criminal process often requires suspects and defendants to make difficult choices. [Citation.]" (*Ibid.*)

The *Neville* rationale implicates the Fourth Amendment as well. Justice Sotomayor recognized as much when, in discussing state advance consent laws in *McNeely* her opinion cited *Neville* with approval. (*McNeely*, 133 S.Ct. at 1566 (plur. opn. of Sotomayor, J.), citing *Neville*, 459 U.S. at 563-564.)

California courts have adopted the holding of Minnesota Court of Appeals and summarize it thus:

> [California] confers on drivers the privilege of *soberly* operating inherently dangerous motorized vehicles on the state's roadways – . . . and, in exchange, each driver accepts a statutory choice. In that choice, if he is arrested on probable cause of driving while impaired, he will either agree (actually consent) to undergo a noninvasive chemical test for scientific evidence of his precise intoxication level, or he will face civil and criminal penalties substantially equivalent to penalties that await those convicted of driving drunk. Unlike those cases in which the Supreme Court has invalidated laws under the unconstitutional conditions doctrine, the condition imposed here tightly relates to the privilege conferred. The statutory condition that every arrested, apparently drunk, driver agrees to submit to a chemical test or be penalized for refusing the test directly and *only* furthers the state's interest in the sober use of public highways.

(*Chasingbear*, 2014 WL 3802616, at 7.)

As noted in a lower court decision in California, "[e]ven with advance consent, however, respondent could have withdrawn that consent and objected to any blood draw. The totality of the circumstances, therefore, includes not only the advance consent, but respondent's conduct and the circumstances surrounding the testing." (*People v. Agnew* (2015) 242 Cal.App.4th Supp. 1, 195 Cal.Rptr.3d at 491.) Within this context, it is not constitutionally impermissible for California to ask its drivers to submit to a simple test to determine if they are impaired.

D. Is there a due process argument here for how the scheme is implemented?

As set forth above, there is no fundamental right to drive on the roads of California. (*McGlothen*, 71 Cal.App.3d at 1021.) There are 32,980,355 registered vehicles in California.[19] Each of these vehicles presents an impaired driver with the opportunity to injure someone.

The California courts' understanding of the Due Process body of law is reflected in *Chasingbear*, 2014 WL 3802616, at 11. The California courts have followed the guidance in *Neville*:

> In *South Dakota v. Neville* (1983) 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (*Neville*), the United States Supreme Court considered whether admitting into evidence at trial a defendant's refusal to submit to a test under an implied consent law violated the defendant's right against self-incrimination under the Fifth Amendment. At the outset, the Court distinguished the holding in *Griffin v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, which had held that a prosecutor's or trial court's comments on a defendant's refusal to take the stand impermissibly burdened the defendant's Fifth Amendment right to refuse to testify. "Unlike the defendant's situation in Griffin, a person

[19] https://www.dmv.ca.gov/portal/dmv/dmv/dmvhomes/dmvnews.

suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." (*Neville*, *supra*, 459 U.S. at p. 560, fn. 10, 103 S.Ct. 916.) The Court then held that a refusal to take a blood-alcohol test, after an officer has lawfully requested it, is not an act coerced by the officer and is therefore not protected by the Fifth Amendment privilege against self-incrimination. In *Neville*, the officer had informed defendant of certain consequences of refusing to test under South Dakota's implied consent law, including license revocation, but had failed to advise defendant that the refusal could be used against him at trial. The Supreme Court therefore then addressed defendant's argument that admitting at trial his refusal to test violated the Due Process Clause because he was not fully warned of the consequences of refusal. The Supreme Court also rejected this challenge. "[W]e do not think it fundamentally unfair for South Dakota to use the refusal to take the test as evidence of guilt, even though respondent was not specifically warned that his refusal could be used against him at trial." (*Id.* at p. 565, 103 S.Ct. 916.) The Court held again that, in contrast to the constitutional right to silence, defendant's right to refuse the blood-alcohol test "is simply a matter of grace bestowed by the South Dakota Legislature." (*Ibid.*) The Court also recognized that other warnings made it clear that refusing to test was not free of adverse consequences.

In *Neville,* in addressing the consequences under the Due Process Clause of the fact that the officers did not specifically warn defendant that the test results could be used against him at trial, the Supreme Court added a note about the effect of warnings under the Fourth Amendment, applying the principles discussed above from earlier Supreme Court cases: "Even though the officers did not specifically advise respondent that the test results could be used against him in court, no one would seriously contend that this failure to warn would make the test results inadmissible, had respondent chosen to submit to the test. Cf. *Schneckloth v. Bustamonte,* [citation omitted] (knowledge of right to refuse not an essential part of proving effective consent to a search)." (*Neville, supra*, 459 U.S. at p. 565, fn. 16, 103 S.Ct. 916.) In a recent Ninth Circuit Court of Appeals decision, the Court considered whether an admonition that incorrectly informed the suspect that his refusal to test was not a freestanding crime under federal law violated due process. The Court cited *Neville* and *McNeely* in stating: "We doubt that the Constitution requires any admonition be given to DUI suspects. *Cf. Missouri v. McNeely* [citation omitted] (noting that 'States have a broad range of legal tools to enforce their drunk-driving laws,' with 'all 50 States hav[ing] adopted implied consent laws'); *Neville*, [citation omitted] (explaining that one's 'right to refuse' a blood alcohol test is not of constitutional origin; it is 'simply a matter of

grace bestowed by' state legislatures)." (*United States v. Harrington* (9th Cir. 2014) 749 F.3d 825, 830.) The Court held, though, that when an admonition is given, due process is violated when it "incorrectly informs the suspect that his refusal is not a freestanding crime, when in fact it is." (*Ibid.*)

In all the above cases addressing consent under the Fourth Amendment, of course, the Supreme Court was addressing the purported failure to inform persons of the right to refuse voluntary consent, where there was no advance consent and where the consequences of refusing consent were not codified. Here, respondent already provided advance consent under the implied consent law, and respondent is relying upon the failure to inform him of the consequences of withdrawing that consent, which are stated in the statute. As an initial matter, respondent should be presumed to know the law. (*People v. Hagedorn* (2005) 127 Cal.App.4th 734, 748, 25 Cal.Rptr.3d 879.) In any event, even applying the Supreme Court's analysis in the cases discussed above, the statutory admonishment of the consequences of refusing to submit to testing under section 23612 should not be a constitutional requirement under the Fourth Amendment.

In fact, the California courts have held that a similar statutorily-required admonition is not constitutionally required. Subdivision (a)(2)(A) of that same section 23612 of the Vehicle Code states: "If the person is lawfully

arrested for driving under the influence of an alcoholic beverage, the person has the choice of whether the test shall be of his or her blood or breath and the officer shall advise the person that he or she has that choice." This requirement that the officer "shall advise" the arrested person of the choice of test is therefore similar to the requirement that a person "shall be told" of certain consequences of failing to submit to testing under subdivision (a)(1)(D), and that the officer "shall advise" the person of other matters under subdivision (a)(4). The courts have nevertheless held that the failure to inform defendants of the choice of tests does not render the blood draw unconstitutional. (Respondent here was told of that choice.)

In *Ritschel v. City of Fountain Valley* (2006) 137 Cal.App.4th 107, 40 Cal.Rptr.3d 48 (*Ritschel*), the Court of Appeal affirmed the dismissal of civil rights claims that were based on officers' forcible taking of a blood sample. The plaintiff alleged that the officers had failed to comply with California's implied consent law by not offering him a choice between blood or breath tests, and therefore had violated his constitutional rights. The Court rejected the claim under the Fourth Amendment, holding that "even assuming the officers violated plaintiff's *statutory* rights under California's implied consent law, it was not a violation of his federal constitutional rights." (*Id.* at p. 118, 40 Cal.Rptr.3d 48, italics in original.) The Court then cited the California cases supporting

> that principle. "California case law unequivocally establishes a police officer's failure to comply with the implied consent law does not amount to a violation of an arrestee's constitutional rights." (*Ibid.*) "More apropos to the present appeal, case law has rejected contentions that a failure to *advise* an arrestee of the tests available or to *honor* the arrestee's choice of a particular test amounts to a constitutional violation." (*Id.* at p. 119, 40 Cal.Rptr.3d 48 (citations omitted).) The Court concluded: "Thus, California decisional law holds a police officer's mere failure to comply with the requirements of this state's implied consent law does not equate with or amount to a violation of the arrestee's rights under the federal Constitution." (*Id.* at 119, 40 Cal.Rptr.3d 48.) In *Harris*, as discussed above, in addressing the contention that the admonition there about the consequences of refusing to test was false, the Court of Appeal relied on this same principle: "As the appellate division recognized in its opinion, failure to strictly follow the implied consent law does not violate a defendant's constitutional rights." (*Harris*, *supra*, 225 Cal.App.4th at p. 692, 170 Cal.Rptr.3d 472 (citation to appellate division opinion, which in turn was quoting *Ritschel*, omitted).)

(*People v. Agnew*, 242 Cal.App.4th Supp. 1, 195 Cal.Rptr.3d at 496-498.)

In a scheme such as the one in California the impaired driver never loses the ability to challenge his withdrawal of his advanced consent. The impaired

driver is entitled to an administrative hearing pursuant to California Vehicle Code section 13353(e). If charged with driving while impaired, the jury could find that the crime was aggravated by withdrawing the advance consent. (See Cal. Veh. Code §23612.) Since due process is not violated by failing to advise the impaired driver of the consequences, it follows that it is not implicated when the full panoply of the opportunity to have a fair hearing is given to that driver.

CONCLUSION

Amicus urges this Court to affirm the rulings of the Supreme Courts of Minnesota and North Dakota.

Respectfully submitted,

MARK ZAHNER
Chief Executive Officer
CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION
921 11th Street
Suite 300
Sacramento, CA 95814

MICHAEL J. YRACEBURN*
COUNTY OF KERN
1215 Truxtun Ave.
Bakersfield, CA 93301
(661) 868-2321
myraceburn@co.kern.ca.us

STEWART HICKS
TRAFFIC SAFETY RESOURCE PROSECUTOR

**Counsel of Record*

Counsel for Amicus Curiae

Nos. 14-1468, 14-1470, 14-1507

In the
Supreme Court of the United States

DANNY BIRCHFIELD,
Petitioner,
v.
NORTH DAKOTA,
Respondent.

WILLIAM ROBERT BERNARD, JR.,
Petitioner,
v.
MINNESOTA,
Respondent.

STEVE MICHAEL BEYLUND,
Petitioner,
v.
GRANT LEVI, DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,
Respondent.

On Writs of Certiorari to the Supreme Court of North Dakota and the Supreme Court of Minnesota

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

LISA SORONEN
State & Local Legal Center
444 N. Capitol St., NW
Suite 515
Washington, DC 20001
(202) 434-4845

GREGORY G. GARRE
Counsel of Record
JONATHAN Y. ELLIS
BENJAMIN W. SNYDER
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
Gregory.Garre@lw.com

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE IMPLIED CONSENT LAWS ARE A LONGSTANDING, COMMON SENSE, AND PERMISSIBLE RESPONSE TO THE GRAVE THREAT OF DRUNK DRIVING 6

A. Drivers Must Comply With Myriad, Reasonable Conditions Anytime They Voluntarily Use The Public's Roadways 7

B. Implied Consent Is An Exception To The Fourth Amendment's Warrant Requirement 14

C. The Implied Consent Laws Do Not Impose An Unconstitutional Condition 18

II. SUBJECTING PETITIONERS TO CRIMINAL PENALTIES FOR VIOLATING THE IMPLIED CONSENT LAWS DOES NOT VIOLATE THE FOURTH AMENDMENT 24

TABLE OF CONTENTS—Continued

Page

III. THE IMPLIED CONSENT LAWS PASS THE ULTIMATE FOURTH AMENDMENT TOUCHSTONE OF REASONABLENESS 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Agency for International Development v. Alliance for Open Society International, Inc.,
133 S. Ct. 2321 (2013) 19

Barlow v. United States,
32 U.S. 404 (1833) 11

Breithaupt v. Abram,
352 U.S. 432 (1957) 6, 15, 18

Brigham City v. Stuart,
547 U.S. 398 (2006) 18

City of Los Angeles v. Patel,
135 S. Ct. 2443 (2015) 14

Dolan v. City of Tigard,
512 U.S. 374 (1994) 19, 20, 23

Florida v. Jardines,
133 S. Ct. 1409 (2013) 16

Florida v. Jimeno,
500 U.S. 248 (1991) 20

Georgia v. Randolph,
547 U.S. 103 (2006) 16

Koontz v. St. Johns River Water Management District,
133 S. Ct. 2586 (2013) 19

TABLE OF AUTHORITIES—Continued

Page(s)

Landmark Communications, Inc. v. Virginia,
435 U.S. 829 (1978) 27

Mackey v. Montrym,
443 U.S. 1 (1978) 6, 20, 23

Michigan Department of State Police v. Sitz,
496 U.S. 444 (1990) 19, 22

Missouri v. McNeely,
133 S. Ct. 1552 (2013) ..... *passim*

Schmerber v. California,
384 U.S. 757 (1966) 5, 21, 28

Schneckloth v. Bustamonte,
412 U.S. 218 (1973) 7, 11, 14, 21

Skinner v. Railway Labor Executives' Association,
489 U.S. 602 (1989) 20

South Dakota v. Neville,
459 U.S. 553 (1983) ..... *passim*

United States v. Biswell,
406 U.S. 311 (1972) 17

United States v. Drayton,
536 U.S. 194 (2002) 21

United States v. Matlock,
415 U.S. 164 (1974) 16

TABLE OF AUTHORITIES—Continued

Page(s)

Whren v. United States,
517 U.S. 806 (1996) 10

Winston v. Lee,
470 U.S. 753 (1985) 28

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XVIII 25

18 U.S.C. § 3118 5

Minn. Stat. § 169.06(4) 8

Minn. Stat. § 169.09(3) 9

Minn. Stat. § 169.14 8

Minn. Stat. § 169.49 9

Minn. Stat. § 169.50 9

Minn. Stat. § 169.57(2) 9

Minn. Stat. § 169.60 9

Minn. Stat. § 169.475 9

Minn. Stat. § 169.685(5) 9

Minn. Stat. § 169.686 9

Minn. Stat. § 169.791(2) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Minn. Stat. § 169A.03 25

Minn. Stat. § 169A.20(2) 22, 25

Minn. Stat. § 169A.20(5) 25

Minn. Stat. § 169A.26 25

Minn. Stat. § 169A.51(1) 10, 20

Minn. Stat. § 169A.51(1)(a) 22

Minn. Stat. § 169A.51(2) 12

Minn. Stat. § 169A.51(3) 20

Minn. Stat. § 169A.275 25

Minn. Stat. § 169A.276 25

Minn. Stat. § 171.02 8

Minn. Stat. § 171.03 8

Minn. Stat. § 171.07(1)(a) 15

Minn. Stat. § 171.08 8

Minn. Stat. § 171.13 ..... 8, 12

N.D. Cent. Code ch. 39-10 8

N.D. Cent. Code § 39-06-01 8

N.D. Cent. Code § 39-06-02 8

TABLE OF AUTHORITIES—Continued

Page(s)

N.D. Cent. Code § 39-06-13 ..... 8, 12

N.D. Cent. Code § 39-06-14(2) 15

N.D. Cent. Code § 39-06-16 8

N.D. Cent. Code § 39-08-01(1)(a) 25

N.D. Cent. Code § 39-08-01(1)(e) 22, 25

N.D. Cent. Code § 39-08-01(2) 25

N.D. Cent. Code § 39-08-01(5) 25

N.D. Cent. Code § 39-08-01(5)(a)(1) 25

N.D. Cent. Code § 39-08-01(5)(b) 12

N.D. Cent. Code § 39-08-06 9

N.D. Cent. Code § 39-08-20 8

N.D. Cent. Code § 39-08-23 9

N.D. Cent. Code § 39-09-02 8

N.D. Cent. Code § 39-16.1-11 8

N.D. Cent. Code § 39-20-01(1) 10, 20, 22

N.D. Cent. Code § 39-20-01(2) 10

N.D. Cent. Code § 39-20-01(3)(a) 12

N.D. Cent. Code § 39-20-01.1 10

TABLE OF AUTHORITIES—Continued

Page(s)

N.D. Cent. Code § 39-21-03(2) 9

N.D. Cent. Code § 39-21-04(1) 9

N.D. Cent. Code § 39-21-06 9

N.D. Cent. Code § 39-21-19 9

N.D. Cent. Code § 39-21-41.2 9

N.D. Cent. Code § 39-21-41.4 9

OTHER AUTHORITIES

Tony Dutzik & Phineas Baxandall, U.S. PIRG Education Fund, Frontier Group, *A New Direction: Our Changing Relationship with Driving and the Implications for America's Future* (2013) 13

1 Wayne R. LaFave, *Search & Seizure* (5th ed.), Westlaw (database updated Oct. 2015) 16

National Highway Traffic Safety Administration, U.S. Department of Transportation, DOT HS 812 102, *Traffic Safety Facts: Alcohol-Impaired Driving* (2014), http://www-nrd.nhtsa.dot.gov/Pubs/812102.pdf 21

TABLE OF AUTHORITIES—Continued

Page(s)

National Highway Traffic Safety Administration, U.S. Department of Transportation, *The Economic and Societal Impact of Motor Vehicle Crashes, 2010 (Revised)* (2015), http://www-nrd.nhtsa.dot.gov/pubs/812013.pdf 7

Michael Sivak & Brandon Schoettle, *Update: Percentage of Young Persons With a Driver's License Continues to Drop*, 13 Traffic Injury Prevention 341 (2012) 13

Robert B. Voas et al., *Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes*, 40 J. Safety Research 77 (2009) 28, 29

INTERESTS OF AMICI CURIAE[1]

Amici are organizations that represent the interests of state and local governments.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This forum offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

---

[1] No counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici*, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have provided consent to this filing, in letters that have been lodged with the Clerk of the Court.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a non-profit professional and educational organization consisting of more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments over the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

Amici are all too familiar with the impact of drunk driving on American communities, families, and citizens. Together, *amici* have helped state and local governments to develop strategies for preventing drunk driving that fit local needs and conditions—strategies that include implied consent laws like the ones at issue here. A decision holding that such laws are unconstitutional would deny state and local governments a longstanding and critical tool in their ongoing efforts to combat drunk driving.

SUMMARY OF ARGUMENT

These cases come to this Court against the backdrop of three undeniable facts. First, drunk driving imposes a terrible toll on America, killing

thousands and shattering the lives of tens of thousands of others each year. Second, for decades, "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to [blood-alcohol] testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Missouri v. McNeely*, 133 S. Ct. 1552, 1566 (2013) (plurality op.). And third, this Court for decades has viewed these laws as "unquestionably legitimate." *South Dakota v. Neville*, 459 U.S. 553, 560 (1983). Petitioners' argument that these important laws have been unconstitutional all along, under a Fourth Amendment theory, should be rejected.

Implied consent laws do not impermissibly burden motorists' Fourth Amendment rights. Consent is a well-forged exception to the warrant requirement. And contrary to petitioners' claims, there is nothing unusual about consent being implied through conduct rather than expressed through words. Just as a homeowner who opens a path from the sidewalk to the door impliedly consents to the police walking that path in accordance with local customs, so too does the homeowner who ventures out onto the highway impliedly consent to a blood-alcohol test required by state law as a condition of using the roads. Nor can petitioners vitiate consent by claiming that they did not *know* about the implied consent laws. Ignorance of the law is not a defense to speeding, or any other law, and it is not a defense to the laws at issue here.

Petitioners invoke the "unconstitutional conditions" doctrine to argue that this consent is unconstitutionally extracted. But that argument flunks both the "essential nexus" and "rough proportionality" factors

that this Court has looked to in applying the doctrine. There can be no serious dispute about nexus. The condition these laws impose (consent to a minimally invasive blood-alcohol test) directly advances a powerful government interest (saving lives) and has a strong connection to the privilege conferred (permission to drive). Nor can there be any real dispute about proportionality: whereas the laws typically require no more than a few breaths into a tube, the costs of drunk driving are staggering.

Petitioners emphasize that the penalties at issue in the case are criminal, but—while it is up to each State to decide what penalty is appropriate—there is no basis for this Court to draw a distinction between implied consent laws that impose administrative versus criminal penalties. The chosen penalty is not a part of the *condition*—it is the means of *enforcing* the condition. No one is forced to agree to go to prison in order to get a driver's license. And it makes perfect sense to equalize the penalty for reneging consent with the penalty that the driver is trying to *avoid* by refusing to take the test. Otherwise, the State would just be creating an incentive to refuse the test, and reducing the deterrent effect of its drunk-driving laws.

Prohibiting States from doing anything more than suspending a driver's license when a motorist withdraws consent after being pulled over for drunk driving would also give drivers, in effect, a free pass. Rather than being forced to make clear up front that they are unwilling to accept the State's (constitutional) condition for using the State's roads, drivers could simply take the license knowing that the worst thing that will happen to them if they refuse a test is that they will be placed in the same position they would

have been in had they been forthright about their unwillingness to accept the condition in the first place, and been denied a driver's license to begin with.

The implied consent laws also pass the Fourth Amendment's ultimate touchstone of reasonableness. Indeed, implied consent laws were enacted to allow States to enforce their drunk-driving laws without having to resort to forced, non-consensual blood draws to collect evidence. And the facts that these laws have been in effect across the Nation for decades, and that this Court has repeatedly upheld them against challenge and referred to them only in approving terms, underscores their reasonableness. Petitioners have provided no basis for this Court to suddenly reverse course and deny the States this longstanding and critical tool in the fight against drunk driving.

ARGUMENT

Implied consent laws like the ones at issue in these cases have existed in this country for half a century. All fifty States and the federal government have adopted some version of these laws. *See Missouri v. McNeely*, 133 S. Ct. 1552, 1566 (2013) (plurality op.); 18 U.S.C. § 3118. Passed in the wake of this Court's decision in *Schmerber v. California*, 384 U.S. 757, 771 (1966), as an alternative to forcing blood draws for alcohol tests, the laws serve as a vital weapon in these States' and the federal government's ongoing battle against drunk driving—a threat that claims thousands of lives each year and injures tens of thousands more.

This Court has heard, and rejected, prior constitutional challenges to these laws. *See, e.g.*, *South Dakota v. Neville*, 459 U.S. 553, 559, 563-64 (1983) (upholding South Dakota's implied consent law against

a Fifth Amendment challenge); *Mackey v. Montrym*, 443 U.S. 1, 3, 18-19 (1978) (upholding Massachusetts's implied consent law against a due process challenge); *see also Breithaupt v. Abram*, 352 U.S. 432, 435 n.2 (1957) (approving of Kansas's implied consent law). And just three Terms ago, a plurality of the Court expressly endorsed these laws as valid and effective "legal tools to enforce ... drunk-driving laws and to secure [blood-alcohol] evidence without undertaking warrantless nonconsensual blood draws." *McNeely*, 133 S. Ct. at 1566.

These cases are different in two principal respects. First, petitioners ground their claims in the Fourth Amendment. And, second, they focus their challenges on implied consent laws that trigger criminal penalties, as opposed to only administrative and civil penalties. Neither distinction justifies an about-face by this Court on the validity of these longstanding laws. The Fourth Amendment, with its over-arching "reasonableness" requirement and well-settled "consent" exception, is an unlikely provision for invalidating these laws, especially compared to the Fifth Amendment and Due Process Clause. And there is no basis for drawing a constitutional line between penalizing drivers by taking away their licenses and penalizing them in the same way they would be for the offense for which they are trying to evade prosecution by reneging on their consent. The judgments below should be affirmed.

I. THE IMPLIED CONSENT LAWS ARE A LONGSTANDING, COMMON SENSE, AND PERMISSIBLE RESPONSE TO THE GRAVE THREAT OF DRUNK DRIVING

It is common ground that, under the Fourth Amendment, a search generally must be accompanied

by a warrant. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). But it is also beyond dispute that one of the "well settled" exceptions to the warrant requirement "is a search that is conducted pursuant to consent." *Id.* In each of the consolidated cases, the State plainly required consent to a blood-alcohol test from anyone who chose to operate a motor vehicle on public roads. Each petitioner accepted the terms of those laws when they voluntarily took to the roads. There is nothing remarkable about implying such consent. There is nothing unconstitutional about that condition in the abstract. And there is nothing problematic about enforcing that commitment here.

A. Drivers Must Comply With Myriad, Reasonable Conditions Anytime They Voluntarily Use The Public's Roadways

1. Driving is an integral part of our country's transportation system and way of life, but there is no denying it is a highly dangerous activity. Anyone who gets behind the wheel of a 4000-pound mass that moves at speeds of up to 70 miles per hour (and beyond) poses a threat not just to the operators of the vehicles, but to all motorists, pedestrians, and property along their way. In 2010, 32,999 people died in automobile accidents on the Nation's roads, another 3.9 million people were injured, and 24 million vehicles were damaged. National Highway Traffic Safety Administration, U.S. Department of Transportation, *The Economic and Societal Impact of Motor Vehicle Crashes, 2010 (Revised)* 1 (2015), http://www-nrd.nhtsa.dot.gov/pubs/812013.pdf. These losses and injuries impose devastating and multifaceted costs on American families, communities, and States.

Understandably, all States condition use of public roadways on an extensive set of rules designed to promote public safety. To be on the roads at all, every driver generally must have a valid license. *See, e.g.*, Minn. Stat. §§ 171.02, 171.03; N.D. Cent. Code §§ 39-06-01, 39-06-02. To obtain such a license from the State of Minnesota, an individual must submit to an examination that includes a test of the applicant's "knowledge of ... traffic laws [including] the legal penalties and financial consequences resulting from violations of laws prohibiting the operation of a motor vehicle while under the influence of alcohol," and any "other physical and mental examinations as the [Commissioner of Public Safety] finds necessary." Minn. Stat. § 171.13. The requirements for a North Dakota license are nearly identical. *See* N.D. Cent. Code § 39-06-13.

As any driver well knows, once on the roads themselves, the requirements and conditions imposed by the States are similarly comprehensive. All drivers must carry their licenses "in the[ir] immediate possession at all times" and "shall physically surrender [it] upon demand of any court, police officer, or a field deputy or inspector." N.D. Cent. Code § 39-06-16; *see also* Minn. Stat. § 171.08. They are required to carry liability insurance, and be ready to produce proof of that insurance on command at any time. *See* Minn. Stat. § 169.791(2); N.D. Cent. Code §§ 39-08-20, 39-16.1-11. And they must abide by all the "general rules of the road," N.D. Cent. Code ch. 39-10, like speed limits, traffic lights, and traffic signs. *See, e.g.*, Minn. Stat. §§ 169.06(4), 169.14; N.D. Cent. Code § 39-09-02.

Every motor vehicle must be equipped with, among other things, headlights, tail lights, and turn signals of

a specific brightness, color, and often height. *See, e.g.*, N.D. Cent. Code § 39-21-03(2) (headlights must be "at a height . . . not more than fifty-four inches nor less than twenty-four inches"); *id.* § 39-21-04(1) (tail lights must "emit a red light plainly visible from a distance of one thousand feet"); *id.* §§ 39-21-06, 39-21-19 (front turn signals must "display a white or amber light . . . visible from a distance of not less than three hundred feet"; rear turn signals "red or amber" and visible from the same distance); *see also* Minn. Stat. §§ 169.49, 169.60 (headlights); *id.* § 169.50 (tail lights); *id.* § 169.57(2) (turn signals).

Drivers and front-seat passengers must always "buckle up"—a requirement that initially was viewed as a significant restraint on personal freedom (if not an outright "seizure") but has been accepted as its safety benefits have become clear. *See* Minn. Stat. § 169.686; N.D. Cent. Code § 39-21-41.4. Children must ride in specialized car seats. *See* Minn. Stat. § 169.685(5); N.D. Cent. Code § 39-21-41.2. Drivers are prohibited from using smart phones to compose, read, or send text messages or emails while driving—even at stop lights—except in cases of emergency. *See* Minn. Stat. § 169.475; N.D. Cent. Code § 39-08-23. In the case of an accident, they must provide the other individuals involved with their name, address, license, registration, and insurance information—and render to any injured person "reasonable assistance." Minn. Stat. § 169.09(3); N.D. Cent. Code § 39-08-06.

A list of similar requirements, rules, and conditions could go on and on. Little wonder that the Court has previously described the use of automobiles as "so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible."

Whren v. United States, 517 U.S. 806, 810 (1996). Indeed, there may be no other activity in which so many Americans so regularly engage that is so closely regulated. Every day Americans commit themselves to be bound by these rules and regulations when they get behind the wheel—to protect their own safety as well as the safety of those they will come across.

2. The cases under review challenge just one of these myriad conditions adopted in *every* State to enhance safety on our Nation's roads—the condition that anyone operating a motor vehicle on public roads consent to a blood-alcohol test where there is probable cause to believe they were driving under the influence of alcohol. *See* N.D. Cent. Code §§ 39-20-01(1), (2), 39-20-01.1; Minn. Stat. § 169A.51(1). In the abstract, that hardly seems like an unreasonable trade-off. And, in most respects, this condition is not meaningfully different than the hundreds of others drivers are bound to follow every day. Any time an individual voluntarily takes to the roads, he is required to abide by the condition imposed by these laws as with all the others—and thus he voluntarily consents (and agrees not to withdraw that consent) to blood-alcohol tests on the laws' terms.

It is true, of course, that this condition, unlike many (though not all) of the others listed above, implicates the Fourth Amendment rights of drivers to be free from unreasonable searches. There is no dispute that the blood-alcohol tests these laws require are "searches" within the meaning of the Fourth Amendment—whether they involve breathing into a tube or drawing blood. Thus, to be lawful in the absence of a warrant or some other exception, the tests must be performed pursuant to consent "voluntarily

given, and not the result of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248.

But there is no basis to conclude that the implied consent given here was anything but voluntary. No State forces anyone to drive on their public roads. And no petitioner claims—nor offers any reason to believe—that the circumstances he faced here were unique in that respect. Indeed, despite their insistence that consent be determined by "careful scrutiny of all the surrounding circumstances," Birchfield Br. 21 (citation omitted), they offer virtually no details about their specific circumstances at all. By all appearances, petitioners enjoyed the privilege of driving on North Dakota's and Minnesota's public roads on their own volition. And because they did, they were bound to abide by the rules and conditions that come with enjoying that privilege, including consenting to and promising not to withdraw consent to blood-alcohol tests in the circumstances presented here.

Petitioners protest that all drivers may not know of each State's implied consent laws when they enter its public roadways—though they conspicuously fail to claim that was true here. *See id.* at 22. But it has long been settled that individuals are presumed to know the laws that govern their conduct. *See Barlow v. United States*, 32 U.S. 404, 411 (1833) (describing the "whole course of the jurisprudence, criminal as well as civil, of the common law" as establishing the point). Petitioners offer no reason to abandon that ancient principle. And they are no more free to claim that they did not know of the condition at issue than they are to claim that they did not know it was against the law to "text while driving."

Indeed, "ignorance of the law" is a particularly weak excuse in this context and for these petitioners. In order to legally drive at all, States generally require their citizens to pass an examination specifically testing their knowledge of the traffic laws, as is true in both these States. *See* Minn. Stat. § 171.13; N.D. Cent. Code § 39-06-13. Every State in the country has adopted a similar requirement of implied consent to blood-alcohol tests.[2] And this Court itself has repeatedly referred to these laws in its publicly available decisions in approving terms.

For their part, petitioners are presumably well-aware of the consent required by their States' laws. Bernard has four drunk-driving convictions since 2006. *See Bernard* Pet. App. 4a & n.1. Both Beylund and Birchfield appear to be repeat offenders as well. *See Beylund* Br. 3 (citing applicable administrative sanction pertaining to offenders with prior suspensions); *Birchfield* Pet. App. 20a (imposing minimum sentence applicable to second-time offenders); *see also* N.D. Cent. Code § 39-08-01(5)(b). The arrests that initiated these cases were not the first time petitioners heard the implied consent advisory required by these laws. *See* N.D. Cent. Code § 39-20-01(3)(a); Minn. Stat. § 169A.51(2).

Petitioners emphasize that consent is required by a "statutory scheme." *See* Birchfield Br. 21-22 ("Consent is no consent at all if the person giving it is forbidden from declining ...."). That is true, but beside the

---

[2] For that reason, ignorance of the law is as unavailing for the driver who crosses state lines as the driver who stays in State. *Cf.* Birchfield Br. 22. In any event, petitioners in these challenges were stopped while driving only within their own State.

point. No one is "forbidden from declining." Consent is required only of individuals who *choose* to drive on public roads in North Dakota and Minnesota, just like subjecting oneself to examination is required for the same privilege or consent to a search of one's person and luggage is required only of individuals who choose to board an airplane. The salient point is that, while no one disputes the importance of driving to many, no one is *required* to drive. As long as the decision to drive, or not, is voluntary, so is the consent that follows.

Petitioners assert that, even if consent follows from the act of driving, driving itself is simply too important a privilege for anyone to avoid—thus vitiating any consent. *See id.* at 22-23. While no one disputes the importance of driving to many if not most Americans, this argument cannot be accepted. For starters, while the strong majority of Americans older than 16 years do, millions of Americans do not. Public transportation systems continue to improve across the country. Millions of Americans have taken to using alternatives like Uber. And, in fact, recent studies indicate that driver's licenses are on the decline across the country among nearly all age groups.[3] The fact that millions of

---

[3] *See, e.g.*, Michael Sivak & Brandon Schoettle, *Update: Percentage of Young Persons With a Driver's License Continues to Drop*, 13 Traffic Injury Prevention 341, 341 (2012) (noting a recent reduction in the "proportionate number of driver's licenses for people of all ages (except for small increases for those between 25 and 29, and over 70)"); *see also* Tony Dutzik & Phineas Baxandall, U.S. PIRG Education Fund, Frontier Group, *A New Direction: Our Changing Relationship with Driving and the Implications for America's Future* 1 (2013) ("The Driving Boom is over.").

Americans choose *not* to drive alone defeats this argument, at least as a general matter.

Moreover, the millions of Americans who do choose to drive are not actually coerced, "by implied threat or covert force," into doing so. *Schneckloth*, 412 U.S. at 228. (Anyone who claims otherwise is free to argue that they have been coerced based on particular facts or circumstances not presented here.) And petitioners' argument—that the "practical necessity" of driving makes any conditions on that privilege coercive—would apply not only to implied consent laws with criminal enforcement mechanisms, but also (indeed, *especially*) to laws that punish refusal to submit to a test by suspending a driver's license. But this Court has described such laws as "unquestionably legitimate," recognizing that a hard choice is not the same as coercion. *Neville*, 459 U.S. at 564.

Of course, there remains the question—addressed in Part I.C. below—whether requiring voluntary consent to a blood-alcohol test impermissibly burdens petitioners' Fourth Amendment rights. But there is no serious question that, on the facts here, petitioners voluntarily provided the required consent.

B. Implied Consent Is An Exception To The Fourth Amendment's Warrant Requirement

That consent justifies a warrantless search under the Fourth Amendment. Consent is a "well settled" exception to the Fourth Amendment's warrant requirement. *Schneckloth*, 412 U.S. at 219; *see City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2454 (2015). Petitioners make much of the fact that, under these laws, consent is "implied" (at least in the first instance) through conduct—*i.e.*, by driving on public roads—not

provided expressly in written or verbal form. But implied consent is still consent, and there is no reason that consent cannot be implied through conduct.[4]

This Court long ago recognized that "[i]t might be a fair assumption that a driver on the highways, in obedience to a policy of the State, would consent to have a blood test made as a part of a sensible and civilized system protecting himself as well as other citizens not only from the hazards of the road due to drunken driving, but also from some use of dubious lay testimony." *Breithaupt*, 352 U.S. at 435 n.2. There, the Court was referring to the fact that consent might be implied in the abstract. Here, it is certainly "fair" to imply consent in accordance with an explicit condition of which all residents are presumed to be aware.

Contrary to petitioners' assertion, implying consent is by no means foreign to this Court's Fourth Amendment jurisprudence. Birchfield Br. 26. The Court has, for instance, recognized implied consent to enter for law enforcement purposes the

---

[4] It is also far from clear that the consent is not in fact express in many if not most cases. For example, most if not all States, including Minnesota and North Dakota, require applicants to actually *sign* their driver's licenses. *See* Minn. Stat. § 171.07(1)(a) ("No license is valid unless it bears the usual signature of the licensee."); N.D. Cent. Code § 39-06-14(2) (same). That signature is fairly viewed as express consent to abide by the legal requirements for driving in the State. In addition, some States actually reiterate the "implied consent" requirement on the license itself. The back of a driver's license in Maryland, for example, states that, "[d]riving in Maryland implies consent to chemical testing for intoxication as required by law. Longer license suspensions may result from refusal to be tested." Surely that statement, coupled with an applicant's signature on the front side of the license, amounts to express consent.

constitutionally protected areas around one's *home*—one of the places where the Fourth Amendment's protections apply with the greatest force. In *Florida v. Jardines*, "it [wa]s undisputed that the detectives had . . . [entered] the constitutionally protected extension of Jardines' home" without express consent of any kind. 133 S. Ct. 1409, 1415 (2013). Yet the Court went on to consider "whether he had given his leave . . . implicitly . . . for them to do so." *Id.* "A license may be *implied* from the habits of the country," it explained. *Id.* (emphasis added) (citation omitted); *see also* 1 Wayne R. LaFave, *Search & Seizure* § 2.3(c) (5th ed.), Westlaw (database updated Oct. 2015) ("[C]ourts have held 'that police with legitimate business may enter the areas of the curtilage which are impliedly open to use by the public . . . .'" (citation omitted)).

The entire Fourth Amendment doctrine of third-party consent is based on similar "assumptions" and "common understandings" about social arrangements—concepts far more abstract than the concrete terms on which consent is implied under the laws at issue here. *See, e.g., Georgia v. Randolph*, 547 U.S. 103, 111 (2006) ("[S]hared tenancy is understood to include an 'assumption of risk,' on which police officers are entitled to rely . . . ."); *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974) ("[I]t is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.").

Petitioners are thus incorrect when they argue that the "only circumstances in which this Court has ever accepted a version of 'implied' consent under the Fourth Amendment is in the administrative inspection

context." Birchfield Br. 26. Indeed, the Court's administrative inspection cases do not turn on consent in the relevant sense at all. Those cases define a distinct exception to the warrant requirement. *See id.* at 28. Where it applies, "the legality of the search depends *not* on consent," but on the authority of the regulatory regime. *United States v. Biswell*, 406 U.S. 311, 315 (1972) (emphasis added). For that reason, petitioners' extended discourse about the various intricacies and requirements of the administrative search doctrine is largely irrelevant. *See* Birchfield Br. 26-29.

Petitioners contend that "allowing implied-consent statutes to constitute a per se, categorical exception to the warrant requirement would make a mockery" of this Court's consent cases. *Id.* at 25 (citation omitted). But no one is arguing for a *per se*, categorical exception to the warrant requirement—or even a particularly broad exception—here. Accepting implied consent like the sort at issue in these cases will not give States free reign to require such consent for any and all searches as a condition of enjoying any and all privileges. . The implied consent laws at issue here are precisely tailored to the problem at hand—drunk driving.

Even where States have an absolute right to deny a privilege or benefit, this Court's "unconstitutional conditions" doctrine (discussed next) prohibits them from conditioning access to those privileges or benefits on unrelated or unreasonable conditions, including implied consent to unrelated or unreasonable searches. They could not, for example, condition driving on consent to a search of one's home (or even the trunk of one's car), as it would have no general relation to the privilege at issue. Nor could they condition driving on

consenting to a wide-ranging search of an individual's DNA, as the intrusion of privacy such a search would entail would far exceed any value gained in ensuring the safety of the roads. The implied consent laws at issue here, by contrast, are limited to a narrow context, in which the State's interests are particularly strong and carefully limited to the threat at hand.

Ultimately, the "touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). Implying consent in this context is plainly reasonable. Indeed, this Court observed decades ago that implying such consent would be "sensible and civilized," especially given "the hazards of the road due to drunken driving." *Breithaupt*, 352 U.S. at 435 n.2. Decades of the use and societal acceptance of these laws make them only more "sensible and civilized" today. And the "hazards" of drunk driving have not diminished in the 50-plus years since the Court made that remark—to the contrary, they have only come into sharper focus.

C. The Implied Consent Laws Do Not Impose An Unconstitutional Condition

1. The only remaining question is whether the implied consent laws nevertheless place an unconstitutional *condition* on the exercise of Fourth Amendment rights. Relying on a pair of nearly thirty-year-old law review articles, petitioners argue that "the 'government may not grant a benefit on the condition that the beneficiary surrender a constitutional right.'" Birchfield Br. 33 (quoting law review article). But as petitioners themselves seem to acknowledge, that is a gross oversimplification. The "unconstitutional conditions" doctrine does not prohibit every condition on a privilege that might "pressure" or

"induce" a person to give up what would otherwise be a constitutional right, *id.* (citation omitted); rather, the doctrine prohibits only those conditions that "*coerc[e]* people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (emphasis added).

At times, some Members of the Court have seemed to adopt the view that to violate this doctrine a condition must be "actually coercive, in the sense of an offer that cannot be refused." *Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013). There is no such *actual* coercion here. *See supra* at 12-14. But, in other instances, the Court has held that a condition may impose "the type of coercion that the unconstitutional conditions doctrine prohibits," *Koontz*, 133 S. Ct. at 2594, if there is not (1) "an essential nexus" between a "legitimate state interest" that the State seeks to advance and the condition it requires, *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (citation omitted), and (2) a "rough proportionality" between what the condition requires of an individual and the "nature and extent" of the potential costs of the privilege the individual seeks to enjoy, *id.* at 391. Those criteria are met here too.

2. The laws at issue easily satisfy both the "essential nexus" and "rough proportionality" factors.

a. There is no question that ensuring the safety of the roads from the undeniable and incalculable harms of drunk driving is a legitimate state interest. Indeed, as this Court has repeatedly recognized, it is a *compelling* one. *See, e.g.*, *McNeely*, 133 S. Ct. at 1565; *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the State's interest in

eradicating it."); *Mackey*, 443 U.S. at 17 (recognizing the "paramount interest the Commonwealth has in preserving the safety of its public highways . . . [by] removing drunken drivers").

Requiring consent to a blood-alcohol test and a promise not to withdraw that consent where an officer has probable cause to suspect drunk driving is directly related to advancing that compelling interest. Indeed, as is evident from their name, blood-alcohol tests are specifically tailored to find evidence of drunk driving—without revealing additional details about the individual. Breath tests are preferred under the Minnesota law, *see* Minn. Stat. § 169A.51(3),[5] and they are incapable of ascertaining anything other than the presence of alcohol or other controlled substances in the bloodstream. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 626-27 (1989). And, while a blood or urine sample could theoretically be used to discover additional details about a person, the only purpose for which consent is required is to "determin[e] the presence of alcohol" or other controlled substance. Minn. Stat. § 169A.51(1); N.D. Cent. Code § 39-20-01(1); *see Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (a consent search is limited to what the "typical reasonable person" would understand as the scope of the consent).

The fact that a State may be able to *force* blood-alcohol tests by obtaining a warrant or demonstrating an exigency based on the particular facts at hand does

---

[5] No action may be taken against a person under the Minnesota law who refuses to take a blood or urine test, unless an alternative test was also offered. Minn. Stat. § 169A.51(3). No alternative to the breath test must be offered. In *Bernard*, the officer requested a breath test only. *See Bernard* Pet. App. 4a-5a.

not mean that it lacks a legitimate interest in securing *prior* consent. The existence of implied consent advances the State's interest in ensuring that it can test the blood alcohol levels of drivers whom officers have probable cause to believe are intoxicated, without having to worry about the time needed to obtain a warrant at 2 a.m. or any number of other factors.

The Court has never held that a consent search is impermissible whenever a warrant might otherwise be obtained. To the contrary, the Court has recognized "a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth*, 412 U.S. at 228. "In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own." *United States v. Drayton*, 536 U.S. 194, 207 (2002).

b. The required condition—consenting to a blood-alcohol test to detect drunk driving and promising not to withdraw that consent where an officer has probable cause of drunk driving—is also, at the least, roughly proportional to the harm it is designed to prevent. Typically, the laws require no more than several breaths into a tube. And even the most invasive test at issue in these cases—a blood test—is a routine procedure that is "safe, painless, and commonplace." *Neville*, 459 U.S. at 563; *see also Schmerber*, 384 U.S. at 771 ("[F]or most people the procedure involves virtually no risk, trauma, or pain."). The burden the States are imposing is minimal.

The costs of drunk driving, by contrast, are staggering. On average, drunk driving claims a life every 52 minutes in the United States. *See* National

Highway Traffic Safety Administration, U.S. Department of Transportation, DOT HS 812 102, *Traffic Safety Facts: Alcohol-Impaired Driving* 1 (2014), http://www-nrd.nhtsa.dot.gov/Pubs/812102.pdf. Depending on the method of calculation, the economic cost of that human tragedy ranges from approximately $50 billion a year to more than $200 billion. *Id.* at 2; *see also McNeely*, 133 S. Ct. at 1565 ("[D]runk driving continues to exact a terrible toll on our society."); *Sitz*, 496 U.S. at 451 ("Media reports of alcohol-related death and mutilation on the Nation's roads are legion."); *Neville*, 459 U.S. at 558 ("The carnage caused by drunk drivers is well documented . . . .").

Petitioners argue that there is no proportionality between "the right to drive" and "criminal fines and imprisonment for test refusal." Birchfield Br. 38. But that is the wrong comparison. The laws explicitly condition the right to drive based on consent "to a chemical test of that person's blood, breath, or urine for the purposes of determining the presence of alcohol [or other] controlled substance." Minn. Stat. § 169A.51(1)(a); *accord* N.D. Cent. Code § 39-20-01(1). Criminal penalties are merely the means of *enforcing* that condition; no one has to agree to go to prison in exchange for receiving a driver's license, a choice that anyone would reject. *See* Minn. Stat. § 169A.20(2); N.D. Cent. Code § 39-08-01(1)(e).

As explained next, that means of enforcement poses no additional Fourth Amendment concerns. *See infra* Part II. But the salient point for purposes of the "unconstitutional conditions" doctrine is that criminal enforcement mechanisms are just that—a means of *enforcing* the condition. They are not the condition itself. Accordingly, they have no more bearing on the

constitutionality of that condition than a city's means of enforcing trespass on a dedication required as a condition of a building permit. *Cf. Dolan*, 512 U.S. at 394-95. Which is to say: the particular means that States have chosen to enforce the condition does not bear on the "unconstitutional conditions" analysis at all.

3. In sum, the States' requirement that, as a condition of driving on the public roads, residents consent to a blood-alcohol test when an officer has probable cause to believe they were driving under the influence falls well within the bounds of this Court's prior cases. This should come as no surprise. Although the Court has yet to engage in this precise analysis, every indication from the Court's precedents points to these laws' constitutionality. When it has encountered implied consent laws in the past, the Court has praised them for "provid[ing] strong inducement to take the breath-analysis test and thus effectuate[] the Commonwealth's interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings." *Mackey*, 443 U.S. at 18. It has indicated that punishing "refus[al] to take a blood-alcohol test is unquestionably legitimate." *Neville*, 459 U.S. at 560. And, as noted, just three Terms ago, a plurality endorsed these laws—and the "significant consequences" "[s]uch laws impose . . . when a motorist withdraws consent"—as a valuable means of "enforc[ing] . . . drunk-driving laws and . . . secur[ing blood-alcohol] evidence without undertaking warrantless nonconsensual blood draws." *McNeely*, 133 S. Ct. at 1566.

Those decisions may not compel the same outcome here. But it would be a surprising development, to say

the least, if the Court were to hold that, lo and behold, these important laws were unconstitutional all along.

II. SUBJECTING PETITIONERS TO CRIMINAL PENALTIES FOR VIOLATING THE IMPLIED CONSENT LAWS DOES NOT VIOLATE THE FOURTH AMENDMENT

Petitioners seek to distinguish this Court's past approval of implied consent laws on the ground that in the earlier cases, the contemplated penalties for refusing to submit to the consented-to test were revocation of a driver's license or use of the refusal as evidence at trial, whereas the penalties here are criminal—essentially the same punishment available for the offense (drunk driving) petitioners sought to evade. *See* Birchfield Br. 40. Even if a State can constitutionally require advance consent to a blood-alcohol test as a condition of driving on the State's roads, petitioners contend, the State cannot impose criminal penalties for drivers who accept the benefit (permission to drive on the roads) and then later renege on the condition (consent) when it becomes inconvenient. That argument should be rejected.

Petitioners cite nothing in arguing that the Constitution distinguishes in this context between evidentiary and administrative penalties, on the one hand, and criminal penalties, on the other. They simply claim that "it should be obvious." *Id.* *Amici* are aware of no cases in which this Court has held that a permissible constitutional condition becomes impermissible based solely on the particular enforcement mechanism a State attaches to it. Nor would such a holding make sense: If a State may constitutionally require its citizens to do X (here, submit to a blood-alcohol test as a condition of utilizing

public roads), nothing in the Constitution says that the State can only enforce that requirement through civil and administrative mechanisms, but not criminal ones. The Eighth Amendment sets the outer bounds of permissible penalties, but within that broad range the Constitution allows States to experiment with the optimal means of enforcement to protect their citizens, as the States have done in prescribing a range of penalties under the implied consent laws. U.S. Const. amend. XVIII.

Moreover, in reneging on their consent, petitioners sought to evade prosecution for the criminal offense of drunk driving by depriving the State of a blood analysis that would confirm that their blood-alcohol level exceeded the legal limit—which *automatically* triggers a conviction for drunk driving. *See* N.D. Cent. Code § 39-08-01(1)(a); Minn. Stat. § 169A.20(5). The laws at issue simply set the punishment for reneging on a driver's consent at the same level as the punishment for the offense from which they are seeking to evade prosecution by refusing to take a blood-alcohol test. *See* N.D. Cent. Code § 39-08-01(1)(a), (e), (2), (5) (punishing test-refusal as equivalent to driving with a blood-alcohol level of at least .08); Minn. Stat. §§ 169A.03, 169A.20(2), 169A.26 (punishing test refusal as equivalent to driving with a blood-alcohol level of .16).[6] No State of which we are aware sets the

---

[6] The punishment for such crimes in both States is graduated based on the number of previous convictions. *See* Minn. Stat. §§ 169A.275-76; N.D. Cent. Code § 39-08-01(5). The minimum punishment for a first offense under North Dakota law is a $500 fine and "an order for addiction evaluation by an appropriate licensed addiction treatment program." N.D. Cent. Code § 39-08-01(5)(a)(1).

punishment at a greater level than the punishment for some form of drunk driving itself.

A hypothetical illustrates the flaws with petitioners' position: Citizen A and Citizen B both apply for driver's licenses. Neither is willing to submit to a Breathalyzer if he is pulled over by an officer who has probable cause to believe that he is driving drunk. Citizen A is forthright about this, and the State therefore denies him a driver's license. Citizen B, by contrast, stays mum and receives a license. Citizen A and Citizen B meet at a bar and have several cocktails. Both make the wrongheaded decision to drive home instead of taking Uber. Both are pulled over. Both—knowing that they are certain to fail—refuse to take Breathalyzers. Both evade a conviction for driving under the influence because the police were unable to secure the key evidence needed for conviction.

No one would dispute that Citizen A could be criminally punished for a criminal offense of driving without a license. But under petitioners' view, Citizen B cannot be criminally punished for refusing to take a Breathalyzer test. Instead, the State would be limited to suspending Citizen B's license. That puts Citizen B in a *better* position than Citizen A, because Citizen B is in the same position *after* his decision to drive drunk (*i.e.*, he no longer has a license) that Citizen A was in *before* he decided to drive (*i.e.*, without a license). In effect, petitioners' rule creates an incentive for residents to accept a government benefit when they have no intention of complying with the State's constitutionally permitted reciprocal condition, knowing that if they are caught the worst that will happen to them is that they will lose a privilege they should not have received in the first place.

Petitioners' rule also could have collateral consequences. Federal, state, and local governments routinely (and legitimately) provide citizens with benefits in exchange for their agreement not to exercise certain constitutional rights, and may enforce those choices with criminal penalties. For example, this Court has endorsed the use of non-disclosure requirements to protect the confidentiality of judicial misconduct proceedings. *See Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 845 (1978). A private citizen who learns the details of those proceedings may have a First Amendment right to publish them, *see id.* at 838, but a citizen who agrees to work for a Judicial Misconduct Commission can be required as a condition of employment to agree not to exercise that First Amendment right. And if the employee subsequently goes back on that agreement and engages in speech that would be protected if voiced by a private citizen, the State can prosecute the violation as contempt. *See id.* at 841 n.12.

Under petitioners' view, however, the State could do nothing more than terminate the employment of an employee who revealed confidential information by "exercising First Amendment rights"—or, in other words, just take away the benefit that the employee accepted in exchange for foregoing a limited exercise of First Amendment rights in the first place.[7]

---

[7] For the reasons offered in the text, a State may impose criminal penalties on drivers who renege on their promise to submit to a blood alcohol test. It follows that a driver's *submission* to a test (like petitioner Beylund's) is not rendered involuntary merely because officers notify him at the time of the test that—as he was presumed to know already—refusing to submit will result in criminal penalties. *See Neville*, 459 U.S. at

III. THE IMPLIED CONSENT LAWS PASS THE ULTIMATE FOURTH AMENDMENT TOUCHSTONE OF REASONABLENESS

"[T]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Winston v. Lee*, 470 U.S. 753, 760 (1985) (quoting *Schmerber*, 384 U.S. at 767). The Fourth Amendment therefore requires a balancing between the "interests in human dignity and privacy," *Schmerber*, 384 U.S. at 769-70, and "the community's need for evidence," *Winston*, 470 U.S. at 760. Even in cases where this Court has held that the latter outweighs the former, it has recognized the significant costs to "personal and deep-rooted expectations of privacy" that such searches entail. *Id.* at 760. As the Court explained in *McNeely*, "any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests." 133 S. Ct. at 1565. That intrusion may be *legitimized* by a warrant, but it is not *lessened* by one.

Implied consent laws were enacted as a means of respecting these privacy and dignitary interests. In *Schmerber*, this Court held that States may take *forced*, nonconsensual blood draws in certain circumstances where there is probable cause to suspect drunk driving. 384 U.S. at 770-72. But "faced with the prospect . . . that recalcitrant offenders would have to be restrained while blood was drawn," States enacted implied consent laws as a way "to avoid forced blood draws." Robert B. Voas et al., *Implied-Consent Laws:*

---

563 ("[T]he offer of taking a blood-alcohol test becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice.").

A Review of the Literature and Examination of Current Problems and Related Statutes, 40 J. Safety Research 77, 78 (2009). All States, and the federal government, have had implied consent laws for decades, and this Court has repeatedly referred to such laws in approving terms—not once suggesting that they raised lurking Fourth Amendment concerns.

Initially, States viewed license suspensions as a sufficient response (and deterrent) to address drunk driving, and set the penalties under implied consent laws to match. *Id.* But over time, States have recognized the need to fight drunk driving more aggressively. Gone are the days of a slap on the wrist. Today many States have imposed jail time and substantial fines for those convicted of driving under the influence, and adopted enhanced penalties for offenders with especially high blood-alcohol content. And as they have done so, a growing number of States have adjusted the penalties for test refusal so that they track the punishment for the underlying offense.

If the Court holds that these criminal penalties somehow violate the Fourth Amendment, the result will be not only to create an incentive for motorists to renege on their consent, but ultimately to encourage *more* "compelled intrusion[s] into the human body" in search of evidence, not fewer. *McNeely*, 133 S. Ct. at 1565. Suspects will view the prospect of *civil* penalties for reneging on their consent as the better option than the *criminal* penalties that accompany a drunk driving conviction. And law enforcement, in turn, will need to *force* blood draws to ensure that drunk driving can be criminally prosecuted. That is not a result that the framers of the Fourth Amendment would relish.

The implied consent laws further safeguard Fourth Amendment interests by providing that officers must have probable cause to believe that a suspect was driving under the influence in order for the test refusal penalties apply. Thus, while the laws do not require officers to secure a warrant on the spot—because they are not *forcing* a nonconsenting suspect to submit to a search—the laws only apply to circumstances where a motorist has been stopped because the officers had probable cause to believe there was drunk driving.

These considerations only bolster the conclusion that the implied consent laws meet the Fourth Amendment's ultimate touchstone of reasonableness.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted,

LISA SORONEN
State & Local Legal Center
444 N. Capitol St., NW
Suite 515
Washington, DC 20001
(202) 434-4845

GREGORY G. GARRE
Counsel of Record
JONATHAN Y. ELLIS
BENJAMIN W. SNYDER
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
Gregory.Garre@lw.com

Attorneys for Amici Curiae

March 22, 2016

Supreme Court, U.S.
FILED
FEB 11 2016
OFFICE OF THE CLERK

Nos. 14-1468, 14-1470 & 14-1502

IN THE

Supreme Court of the United States

DANNY BIRCHFIELD, *Petitioner*,
v.
NORTH DAKOTA, *Respondent*.

WILLIAM ROBERT BERNARD, JR., *Petitioner*,
v.
STATE OF MINNESOTA, *Respondent*.

On Writ of Certiorari
to the Supreme Court of North Dakota and the
Supreme Court of Minnesota

Brief *Amicus Curiae* of Downsize DC Foundation, DownsizeDC.org, United States Justice Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, and Institute on the Constitution in Support of Petitioners

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D Street
Suite 2
Ramona, CA 92065
Attorney for Amicus Curiae
U.S. Justice Foundation

ROBERT J. OLSON
HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

**Counsel of Record*
February 11, 2016

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE SUPREME COURTS OF MINNESOTA AND NORTH DAKOTA WRONGLY ASSUMED THAT THE FOURTH AMENDMENT PROTECTS ONLY PRIVACY INTERESTS 4

A. Breath Tests and Blood Tests Are Not Searches "Incident to Arrest" as Claimed in Bernard 4

B. A Person Has Not "Consented" to a Fourth Amendment Violation simply because He Obtained a Driver's License, as Claimed in Birchfield 7

II. UNITED STATES V. JONES AND FLORIDA V. JARDINES REVITALIZED THE FOURTH AMENDMENT'S PROPERTY UNDERPINNINGS ... 10

A. Since Jones and Jardines, the Foremost Interest Protected by the Fourth Amendment Is Property, Not Privacy 10

B. This Court's Recent Cases Have Not Consistently Applied Property Principles . 13

III. PROPERTY PRINCIPLES APPLY TO SEARCHES AND SEIZURES OF BLOOD AND BREATH 16

A. Americans Have Property Interests in Their Persons, including Their Blood and Breath 16

B. In Order to Interfere with One's Property in His Person, the Government Must First Prove It Has a Superior Property Interest 18

C. North Dakota's Claim of Implied Consent Conflicts with the Fourth Amendment Property Principle 20

D. North Dakota's Reasonableness Claim Conflicts with the Fourth Amendment Property Principle 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page

U.S. CONSTITUTION
Amendment IV ..... 1, *passim*

CASES
Atwater v. Lago Vista, 532 U.S. 318 (2001) 7
Boyd v. United States, 116 U.S. 616 (1886) 18
Chimel v. California, 395 U.S. 752 (1969) 19
City of Los Angeles v. Patel, 576 U.S. ___,
135 S. Ct. 2443 (2015) 13, 22
Entick v. Carrington, 95 Eng. Rep.
807(K.B. 1765) 12
Florida v. Jardines, 569 U.S. 1 (2013) .... 2, *passim*
Grady v. North Carolina, 575 U.S. ___,
135 S.Ct. 1368 (2015) 15, 17
Heien v. North Carolina, 574 U.S. ___,
135 S. Ct. 530 (2014) 13
Kyllo v. United States, 533 U.S. 27 (2001) 9
Maryland v. King, 569 U.S. ___,
133 S.Ct. 1958 (2013) 7, 14, 16
McDonald v. United States, 335 U.S. 451 (1948) . 8
Missouri v. McNeely, 569 U.S. ___,
133 S.Ct. 1552 (2013) 14
Moore v. Regents of the University of California,
793 P.2d 479 (Cal. 1990) 17
People v. Chiagles, 237 N.Y. 193 (1923) 18
Riley v. California, 573 U.S. ___,
134 S. Ct. 2473 (2014) ..... 3, *passim*
Rodriguez v. U.S., 575 U.S. ___,
135 S.Ct. 1609 (2015) 13
State v. Riley, 303 Minn. 251 (1975) 6

United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012) ..... 2, *passim*
United States v. Robinson, 414 U.S. 218 (1973) 4, 19

MISCELLANEOUS

J.P. Bishop, Criminal Procedure, Little, Brown & Co., 1880 19
J. Locke, Second Treatise of Government (facsimile ed.), reprinted in J. Locke, Two Treatises of Government (P. Laslett, ed., Cambridge Univ. Press: 2002) 16, 21, 25
R. Perry & J. Cooper, eds., Sources of Our Liberties (rev. ed., ABA Foundation: 1978) 24
H. Titus & W. Olson, "U.S. v. Jones: Reviving the Property Foundation of the Fourth Amendment," CASE WESTERN RESERVE SCHOOL OF LAW JOURNAL OF LAW, TECHNOLOGY & THE INTERNET, vol. 3, no. 2 (Jan. 2013) 11

INTEREST OF THE *AMICI CURIAE*[1]

Downsize DC Foundation, United States Justice Foundation, Gun Owners Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). DownsizeDC.org and Gun Owners of America, Inc. are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, and related issues.

SUMMARY OF ARGUMENT

These consolidated cases involve two states laws which criminalize an automobile driver's refusal to consent giving blood and breath samples as part of a traffic stop and subsequent arrest. This Court already has refused to create an "exception" to the Fourth

---

[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Amendment requirement that the police obtain a warrant before conducting these tests. But now, in an effort to do indirectly what this Court has ruled they cannot do directly, various states are now conditioning the right to drive an automobile on the waiver of a driver's constitutional rights.

In analyzing the state statutes, both the state supreme courts below assumed that the only Fourth Amendment issue was whether drivers have a "reasonable expectation of privacy." The Supreme Court of Minnesota decided that a blood or breath search is simply a "search incident to arrest," and that since a person has no privacy interest in his body once he has been arrested, the state has unlimited power to do with him whatever it wishes. On the other hand, the Supreme Court of North Dakota concluded that, by obtaining a driver's license, a person is deemed to have given "consent" to such searches, and, in any event, the requirement to participate in chemical tests is "reasonable." Neither court paused to consider whether Americans have a protected property interest — rather than an expectation of privacy interest — which is protected by the Fourth Amendment.

In Unite States v. Jones, this Court restored the Fourth Amendment's private property "baseline." Finding that a search occurred when a GPS tracking device was placed on a vehicle, it was unnecessary to consider whether the owner also had a "privacy" interest, because it was clear that the government had committed a trespass to property. The next year in Florida v. Jardines, the Court applied that same principle to a drug dog search of a home, finding not

only that a search had occurred, but also that the search was unreasonable because the government violated his property rights. Since Jones and Jardines., however, this Court has failed to apply these Fourth Amendment property principles consistently. Rather, for the most part, the Court has reverted to a narrow focus on expectations of privacy.

The Fourth Amendment first and foremost protects an individual's right to be secure in his "person" — which is to say, his own body. Unless the government first demonstrates that it has a superior property interest giving it the right to intrude on that property right, the government becomes a common law trespasser. Thus, while the government obtains a limited authority to safely seize and detain a person who has been arrested, that authority does not grant the government carte blanche power to do whatever it wishes to the person's body incident to arrest. This conclusion is in line with the Court's recent decision in Riley v. California, which held that the government does not obtain complete authority to do whatever it wishes with a person's cell phone simply because it has taken it away from him upon arrest.

Finally, no state may, as North Dakota has done here, invoke its police power to regulate automobile traffic to justify criminalizing the refusal to submit to a breath, blood or urine test without regard for the Fourth Amendment-protected property right in one's person.

ARGUMENT

I. THE SUPREME COURTS OF MINNESOTA AND NORTH DAKOTA WRONGLY ASSUMED THAT THE FOURTH AMENDMENT PROTECTS ONLY PRIVACY INTERESTS.

A. Breath Tests and Blood Tests Are Not Searches "Incident to Arrest" as Claimed in Bernard.

The Supreme Court of Minnesota attempts to justify its effort to compel Bernard to take a breath test as a "search incident to arrest" — as if that is akin to searching him for weapons or taking away his cell phone. Minnesota v. Bernard, 859 N.W.2d 762, 772 (2015). This rationale applies, it is claimed, because this Court, in United States v. Robinson, 414 U.S. 218 (1973), permitted a "full search of the person." Bernard, at 767, *see* Robinson at 235. The Minnesota court claims that "our research has not revealed a single case anywhere in the country that holds that a warrantless breath test is not permissible under the search-incident-to-a-valid-arrest exception." Bernard, at 767-68.

Although the Supreme Court of Minnesota recognizes this Court has put limits on searches of "areas" incident to arrest, it claims this Court has not similarly spoken of limits on a person's body, and so surmised that there are **no limits** on searches of

"persons" incident to arrest. *Id.* at 769.[2] Indeed, the Minnesota court asserts, "the Supreme Court referred to the police's 'authority' to search an arrested person as '**unqualified**,'" and "ha[s] not narrowed the exception with respect to a search of the arrestee's body." *Id.* at 769 (emphasis added). The Minnesota court then cites Riley for the proposition that the police need not have any sort of particularized suspicion before they conduct any sort of search "of the person" after arrest. *Id.* at 770. However, the Minnesota court drew no lessons from this Court's limitation on the search incident to arrest doctrine in Riley barring access to the arrestee's property, *i.e.*, his cell phone.

As Petitioner correctly notes, the holding of the Supreme Court of Minnesota that **any** search of the person is permissible "turns Fourth Amendment doctrine on its head." Bernard Brief at 13. If true, a person would have greater rights in the cell phone in his pocket than he would in the blood in his veins. Such searches of the person are permissible, the court believes, because "someone 'lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the **privacy** of his person.'" Bernard at 767. Indeed, the Minnesota court cites

---

[2] The government made a similar argument supporting limitless power to search "papers" and "effects" incident to arrest in United States v. Wurie, decided together with Riley v. California, 573 U.S. ___, 134 S.Ct. 2473 (2014) ("an arresting officer may seize and search any items found on an arrestee's person, including closed containers"). Petition for a Writ of Certiorari in Docket No. 13-212 at 4. This Court rejected the government's argument. Riley at 2485.

various cases where, based on a privacy analysis, it upheld warrantless searches as incident to arrest including: the taking of photographs, fingerprints, X-rays, the giving of medical examinations, and even forcibly stripping a person for a "close range inspection"[3] of his penis. *Id.* at 767. The court then cites various cases from other courts which have upheld taking strands of hair, cavity searches, etc. *Id.* at n.4.

Under the Minnesota court's "privacy" analysis, then, there appear to be no limits on the search of a person incident to arrest. Hypothetically, if a person were suspected of hiding narcotics, there might be no Fourth Amendment problem to searching his clothing, then strip searching him, then conducting cavity searches, then taking an X-ray of his intestines, then giving him several enemas, and then finally forcibly sedating him with drugs and giving him a nonconsensual colonoscopy, over a period of 14 hours — so long as a court deemed the person had no "reasonable expectation of **privacy**." Unfortunately, such a horrific "search" is not just a hypothetical — it actually occurred.[4]

---

[3] State v. Riley, 303 Minn. 251, 253 (1975).

[4] *See* Eckert v. City of Deming, USDC NM, Docket No. 13-0727, Document #81, p. 2. In this case, there were never any criminal charges filed because the police were unable to find any evidence of a crime. What is also notable in this case is that the police actually obtained a warrant permitting their aggressive search, on the wholly unsuspicious ground that the suspect stood "erect and he kept his legs together," as well as that he had been known to conceal drugs in the past. "David Eckert Appears to Clench His

Under such a **privacy**-based theory it has been decided that DNA can be taken from arrestees. *See* Maryland v. King, 569 U.S. ___, 133 S.Ct. 1958 (2013). Under such a privacy test, it could be decided that bloodletting (or perhaps even colonoscopies) were reasonable searches incident to each and every arrest. And indeed, this Court already has ruled that police may lawfully arrest a person for any minor infraction, even if the maximum penalty does not include jail time. *See* Atwater v. Lago Vista, 532 U.S. 318 (2001). Viewing the Fourth Amendment as only protecting an amorphous "expectation of privacy" has led to its virtual nullification by the Minnesota court.

B. A Person Has Not "Consented" to a Fourth Amendment Violation simply because He Obtained a Driver's License, as Claimed in Birchfield.

The Supreme Court of North Dakota's decision in North Dakota v. Birchfield, 2015 ND 6 (2015), is far from a model of clarity. To be sure, the court's ultimate holding is clear enough — that the state may criminalize a driver's refusal to submit to chemical tests. But the court's reasoning is entirely obtuse.

First, the court cites the Minnesota Court of Appeals for the proposition that no warrant is required for a Fourth Amendment search "when the

---

Buttocks; Cops Order Enemas, Colonoscopy, X-Ray For Non-Existent Drugs" (Nov. 5, 2013) http://www.huffingtonpost.com/2013/11/05/david-eckert-enema-colonoscopy-drugs-traffic-stop_n_4218320.html.

circumstances established a basis for the officer to have alternatively ... secur[ed] and execut[ed] a warrant." *Id.* at *P12 (*citing* State v. Bernard, 844 N.W.2d 41, 42 (Minn. Ct. App. 2014). *See* Birchfield Pet. at 5-6. But the court never says whether it agrees with this holding or adopts it as its own.[5]

Second, the court cites to the opinion of the district court below, which held that since Birchfield refused consent, "'[t]here was no search so there was no Fourth Amendment violation.'" 2015 ND 6 at *P14. *See* Birchfield Pet. at 6. Again, it is entirely unclear whether the court below actually adopted this argument.

Third, finally stating its holding, the court notes that whatever other issues are involved in the case "the 'touchstone of the Fourth Amendment is

---

[5] The warrant requirement is no small matter. This Court has explained that "[w]e are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.... And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." McDonald v. United States, 335 U.S. 451, 455-56 (1948).

reasonableness,'" and that the search in this case was reasonable. *Id.* at *P17. The court notes that reasonableness is "assessed by balancing the promotion of legitimate governmental interests with the intrusion on an individual's **privacy**." *Id.* (emphasis added). In order to find the search to be reasonable, the Supreme Court of North Dakota simply assumed that laws which condition actions on the giving of so-called "implied consent" are insignificant privacy intrusions:

> A licensed driver has a diminished expectation of privacy with respect to enforcement of drunk-driving laws because he or she is presumed to know the laws governing the operation of a motor vehicle, and the implied consent laws contain safeguards.... [*Id.*]

In sum, statutory implied consent is justified because there is no reasonable expectation of privacy. And there is no privacy interest because there was implied consent. It is no wonder that this Court has stated the reasonable expectation of privacy test "has often been criticized as circular...." Kyllo v. United States, 533 U.S. 27, 34 (2001). This circular, manipulable reasoning that courses through the Supreme Court of North Dakota's opinion demonstrates why this Court in United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012) and Florida v. Jardines, 569 U.S. 1, 133 S.Ct. 1409 (2013) returned the Fourth Amendment to its property roots. As stated in Jardines, a property analysis "keeps easy cases easy." *Id.* at 1417. Privacy, on the other hand, leads to *ad hoc* decisions like the decisions of the

Supreme Courts of Minnesota and North Dakota here under review.

II. UNITED STATES v. JONES AND FLORIDA v. JARDINES REVITALIZED THE FOURTH AMENDMENT'S PROPERTY UNDERPINNINGS.

The decisions of the Minnesota and North Dakota courts under review wholly ignored the property interests protected by the Fourth Amendment.

A. Since Jones and Jardines, the Foremost Interest Protected by the Fourth Amendment Is Property, Not Privacy.

In Jones, a number of these *amici* filed a brief at the petition stage in support of neither party, asking the Court to grant the petition, but not to resolve the case based on the questions presented by the parties, which involved "reasonable expectations of privacy."[6] Rather, they urged the Court to take advantage of the "historic opportunity" to restore the Fourth Amendment to its private property roots. *Id.* at 3. Indeed, when granting the petition, the Court added

---

[6] Brief *Amicus Curiae* of Gun Owners of America, Inc., *et. al.* in Support of Neither Party, in United States v. Jones (No. 10-1259) (May 16, 2011) http://www.lawandfreedom.com/site/constitutional/USvJones_amicus.pdf. *See also* Brief *Amicus Curiae* of Gun Owners of America, Inc., *et. al.* in Support of Respondent, in United States v. Jones (No. 10-1259) (Oct. 3, 2011) http://www.lawandfreedom.com/site/constitutional/USvJones_Amicus_Merits.pdf.

the property issue to the questions to be addressed by the parties.[7]

In its decision in Jones, the Court held that "the Katz reasonable-expectation-of-privacy test [was] *added to*, not *substituted for*, the common-law trespassory test." *Id.* at 952. Returning to the Fourth Amendment's property rights "baseline,"[8] the Court found it unnecessary to proceed to any examination of privacy interests, finding instead that the warrantless installation of a GPS tracking device on a car was a search because the government trespassed upon property. *Id.* at 954.[9]

Confusingly, Jones expressly left open the issue whether the trespassory "search" of Jones' property could nevertheless somehow constitute a "reasonable" search. *Id.* at 954. Jones did not explain how the government could conduct a "reasonable" trespass. On the contrary, based on property principles, a search or seizure is *per se* unreasonable if the government violates a person's property rights without first demonstrating that it has a superior property interest, since otherwise, the government acts as no more than

---

[7] http://www.supremecourt.gov/qp/10-01259qp.pdf.

[8] Jardines, 133 S. Ct. at 1414.

[9] For a discussion of this Court's approach in Jones, *see* H. Titus & W. Olson, "U.S. v. Jones: Reviving the Property Foundation of the Fourth Amendment," CASE WESTERN RESERVE SCHOOL OF LAW JOURNAL OF LAW, TECHNOLOGY & THE INTERNET, vol. 3, no. 2 (Jan. 2013) http://lawandfreedom.com/site/publications/Case%20Western%20Law%20Review.pdf.

a common trespasser. Providentially, however, that was precisely the conclusion reached in Jardines, which came before the Court the very next year.

In Jardines, the police trespassed onto the front porch of a house in order to have a drug sniffing dog conduct a search of the exterior of the home. The Court initially stated that it would confine itself to the limited question, as it had done in Jones, "of whether the officers' behavior **was a search**...." *Id.* at 1414 (emphasis added). However, the Court expanded its inquiry, recognizing that "the question before the court is precisely *whether* the officer's conduct **was an objectively reasonable search**." *Id.* at 1416-17 (emphasis added). That question of reasonableness, the Court noted, "depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered." *Id.* at 1417. To determine whether the search was reasonable, the Court did not look at reasonable expectations of privacy. *Id.* Instead, the Court examined property principles, not only to determine that (i) a **search had occurred**, but also to decide (ii) **the search was unreasonable because it violated Jardines' property rights**. *Id.* at 1415-1417.

The Court began by citing the seminal English property case of Entick v. Carrington, 95 Eng. Rep. 807, 817 (K.B. 1765), for the proposition that "[o]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave." *See* Jardines at 1415. The Court then looked at the property concept of "license," and determined

"from the habits of the country" that, in the absence of any no trespassing sign, a person generally may traverse another's property in order to knock on his front door. However, the Court noted, that is all the police may do, because it is "'no more than any private citizen might do.'" *Id.* at 1416. However, the Court noted, "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*." *Id.*

Conspicuously and completely absent from this analysis in Jardines is any discussion of privacy interests — such as how serious an intrusion a drug dog sniff is to a homeowner, or how compelling an interest the government has in ferreting out marijuana grow houses. It was enough that there was a trespass — a violation of Jardines' property interests.

B. This Court's Recent Cases Have Not Consistently Applied Property Principles.

Since Jones and Jardines were decided, this Court has handed down opinions in numerous Fourth Amendment cases, involving persons,[10] houses, papers,[11] and effects.[12] Perhaps because litigants have not recognized the sea change that its recent decisions

---

[10] *See* Heien v. North Carolina, 574 U.S. ___, 135 S.Ct. 530 (2014).

[11] *See* Riley v. California, 573 U.S. ___, 134 S.Ct. 2473 (2014); City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443 (2015).

[12] *See* Rodriguez v. U.S., 575 U.S. ___, 135 S.Ct. 1609 (2015).

have made in Fourth Amendment jurisprudence, the Court has failed to follow its own lead from Jones and Jardines, instead deciding case after case based on subjective notions of privacy, without consideration as to whether the Fourth Amendment's property rights baseline applies.

In Missouri v. McNeely, 569 U.S. ___, 133 S.Ct. 1552 (2013), for example, the Court considered whether to create a *per se* exception to the warrant requirement for chemical tests, because of the transient nature of alcohol in the human body. Without even pausing to consider whether a person has a **property** right in his own body or blood, the Court instead asserted that the case "implicates an individual's 'most personal and deep-rooted expectations of **privacy**'" — noting the "motorist's **privacy** interest in preventing an agent of the government from piercing his skin." *Id.* at 1559, 1565 (emphasis added). Not even the dissenting justices mentioned property principles.

In Maryland v. King, the Court justified the Orwellian process of the state forcibly taking a DNA sample from persons after arrest. Although one's DNA is clearly the essence of one's property in his "person" (a virtual genetic blueprint of his being), the Court again failed to consider whether the state had a legitimate property interest in capturing and recording in a state database a person's genetic makeup. Unfortunately, the Court again reverted to its privacy analysis, stating that "we balance the privacy-related and law enforcement-related concerns...." *Id.*, 568 U.S. at 1970.

Although Jones rejected the idea that Fourth Amendment concerns were not implicated because the search was merely a "technical trespass" (*id.* at 958), the Court in King using a privacy analysis reached the opposite conclusion — that "the intrusion of a cheek swab to obtain a DNA sample is a minimal one," to be overridden by "legitimate police concerns" of verifying the identity of an arrested person. *Id.* at 1975, 1977. Once again, not even a dissenting Justice raised the property issue.

Then, just last year, without the benefit of briefing or argument, the Court issued a *per curiam* opinion in Grady v. North Carolina, 575 U.S. ___, 135 S.Ct. 1368 (2015). There, the Court considered the issue of placing a GPS tracking device on a person's body (rather than on his car). Just as in Jones, the Court held that the government "conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." *Id.* at 1370. But the Court then failed to do what it had done in Jardines, applying property principles to determine if the search was reasonable. Instead, the Court appears to have decided that a trespassory **property** violation somehow could be cured by consideration of "**privacy expectations**" — by examining "the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes...." *Id.* at 1371 (emphasis added). Whereas Jones instructed to look first and foremost at property principles, Grady appears to permit privacy considerations in through the back door as a means for the government to cure a property rights violation. This result appears to be

exactly what Jardines assured would not occur: that, while privacy may add to the property rights "baseline," it most certainly "does not subtract anything." Jardines at 1414.

In Jardines, the Court noted that "[o]ne virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy." *See* Jardines at 1417. By failing to reaffirm the property principles set out in Jones and Jardines, following Grady would make an "easy case[]" difficult again.

III. PROPERTY PRINCIPLES APPLY TO SEARCHES AND SEIZURES OF BLOOD AND BREATH.

A. Americans Have Property Interests in Their Persons, including Their Blood and Breath.

As Justice Scalia has noted, the Fourth Amendment first and foremost protects "persons." Maryland v. King, 133 S.Ct. at 1982 (Scalia, J., dissenting). This was far from a new concept, as John Locke noted that the property of one's body is the root of all other property rights: "being the Master of himself, and the Proprietor of his own Person, and the Actions ... of it," a man has "in himself the great Foundation of Property...." J. Locke, Second Treatise of Government, §44 (facsimile ed.), reprinted in J. Locke, Two Treatises of Government, pp. 297-98 (P. Laslett, ed., Cambridge Univ. Press: 2002). Locke wrote that "every Man has a Property in his own Person.... The

Labor of his Body and the Work of his Hands ... are properly his." *Id.* at §27, p. 287.

This Court, as well, has implicitly recognized[13] that a person's body constitutes his property. Indeed, Jones recognized that "[t]he text of the Fourth Amendment ... 'persons, houses, papers, and effects' ... reflects its close connection to property." *Id.* at 949. Jones went on to state that "[t]he Fourth Amendment protects against **trespassory searches** of '"**persons**, houses, papers, and effects...."' *Id.* at 953 (emphasis added). In recognizing that a trespass can be committed against one's "person," the Jones Court recognized that one has a property interest in his own body. *See* Grady, 135 S.Ct. at 1370 ("In light of [Jones and Jardines], it follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements.").[14]

---

[13] One would be hard pressed to find an explicit recent holding from this Court that a person has a property interest in his own body. This is, in part, because of the Court's five-decade odyssey into the atextual, judicially-invented notion of "privacy rights" in a variety of contexts.

[14] Admittedly, there have been cases holding that biological material (organs, blood, DNA, etc.) cease to be a person's property once they have been **voluntarily** removed from his body. *See, e.g.*, Moore v. Regents of the University of California, 793 P.2d 479 (Cal. 1990).

B. In Order to Interfere with One's Property in His Person, the Government Must First Prove It Has a Superior Property Interest.

A person's private property rights protect him not only against trespass by his fellow man, but also — and increasingly more importantly — against trespass by the government. Only when the government demonstrates that it has a superior property interest may it search or seize one's property — including his person. This Court embraced that principle in Boyd v. United States, 116 U.S. 616, 623 (1886). When the government intrudes upon a person's property (including his person) without first demonstrating such a superior property interest, it is nothing more than a trespasser. Judge Cardozo described the "basic principle" to be "[s]earch of the person is unlawful when the seizure of the body is a **trespass**.... Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its **physical dominion**." People v. Chiagles, 237 N.Y. 193, 197 (1923) (emphasis added).

No doubt some have claimed, as did the Supreme Court of Minnesota,[15] that this limited authority for a search "**of** the person" justifies an unlimited search **in** the person. But that view is insupportable in reason as well as law. At common law, the authority to arrest was accompanied by a very limited power to separate the person being arrested from various objects that

---

[15] *See* Minnesota v. Bernard, 859 N.W.2d 762, 769-770 (Minn. 2015).

may be on his person. The purpose of this "search incident to arrest" is to effectuate the arrest, and "merely involve[s] a search of [the] person [not] a separate search of effects found on his person." United States v. Robinson, 414 U.S. 218, 255 (1973) (Marshall, J., dissenting). Thus, "[a]n officer, having made an arrest, is required to keep the prisoner **safely** until lawfully discharged; and, if the latter is **violent**, or if for any other reason an attempt at escape is apprehended, he may search his person to ascertain whether he has **implements to aid his escape**, and may take them away." J.P. Bishop, Criminal Procedure at § 210, Little, Brown & Co., 1880 (emphasis added). *See* Chimel v. California, 395 U.S. 752 (1969). In no way could the government's limited interest in searching a person's body for weapons and implements of escape extend to taking a person's blood or his breath. *See* Bernard Brief at 15-16.

When the government has the authority to make a lawful arrest, the police and jailers are vested with a property interest over that person's body superior to the person's right to move freely and uninterrupted. However, that interest is limited to keeping the person safely detained while under arrest or imprisoned. The government does not own the entire "bundle of sticks" of property interests in a person's body simply because he has been arrested or imprisoned. The property interest the government possesses is limited to effectuating the arrest and detention safely — it does not extend to searching cell phones or searching blood and breath for evidence.

C. North Dakota's Claim of Implied Consent Conflicts with the Fourth Amendment Property Principle.

As the Petitioner in Birchfield points out, the State of North Dakota would have this Court rule that motorists who travel on the State's highways may be searched as if they had voluntarily and specifically given the State permission to conduct a breath, blood, or urine test for alcohol content. *See* Birchfield Brief at 9-10, 20-29. In addition to the reasons set forth by Petitioner Birchfield, the State's theory of consent should be rejected because it constitutes a direct attack on Petitioner's property interests that are expressly protected by the Fourth Amendment.

As noted above, the Fourth Amendment protects foremost the people's property interest in their persons. *See* Sec. III.A, *supra*. As Petitioner has amply demonstrated, we live in a motorized society wherein "the ability to drive is a practical necessity for most adults." Indeed, "the majority of persons in the United States today are entirely dependent on their ability to drive in order to commute to work, attend school, buy groceries, or visit a doctor." Birchfield Br. at 22-23. This dependency is "especially acute" in the wide-open spaces of North Dakota, where the distances are long and the alternatives to private transportation are few. *Id.* at 23.

Access to the public highways by means of a private automobile is, therefore, essential, enhancing one's freedom of movement and multiplying one's freedom of communication, both of which are necessities if a

person is to maximize the economic productivity of one's person. As is true of the cell phone today, automobiles have been "a pervasive and insistent part of daily life" such that, as this Court has recently observed, "the proverbial visitor from Mars might conclude they were an important feature of the human anatomy." Riley at 2484.

Indeed, if John Locke were alive in America today, he would have recognized that ownership of a car is not just an object to possess, but a central aspect of one "being the Master of himself, and the Proprietor of his own Person, and the Actions ... of it." Locke's Second Treatise, §44 at 298. A North Dakota driver does not suffer "'a diminished expectation of privacy with respect to enforcement of drunk driving laws'" — as the State has contended — leading to the loss of rights protected by the Fourth Amendment (Birchfield Br. at 24). Rather, the State's drivers should be understood to have an enhanced property interest in their private cars as "conveniences of life ... perfectly his own, ... not belong[ing] in common to others." Locke at §44, p. 299.

To be sure, North Dakota has also contended that consent may be implied from the fact that automobile use has been closely regulated, requiring licensure, vehicle inspections, and the like, triggering the "administrative inspection doctrine" of warrantless searches and seizures. *See* Birchfield Br. at 26-27. In addition to the Petitioner's objections that the doctrine applies only to a very limited sector of the nation's economy (*id.*), it must be remembered that the administrative inspection doctrine itself is inapplicable, resting upon an alleged "diminution of

privacy expectations" that would justify even "random searches of the stock and premises of the business." *See id.* at 26.

Just last term, this Court rejected an invitation to extend this administrative exception to hotel registries, based on the argument that the hoteliers have a reduced privacy interest in protecting the "sensitive information" of their guests. *See* City of Los Angeles v. Patel, 135 S.Ct. 2443, 2454-57 (2015). Rather, the Court deferred to the business interests of each hotel to be free from discretionary government searches without "precompliance review" by a disinterested magistrate, provided by the warrant clause of the Fourth Amendment. *Id.* at 2456-57. In so ruling, the Patel Court protected hotel owners from "searches ... used as a pretext to harass hotel operators and their guests," thereby leaving it up to the hotel operator — not the police — whether to permit government inspection of his guest registry.[16] *Id.* at 2453.

Likewise here, the operator of a motor vehicle should be free to make the decision to undergo a blood, breath, or urine test, without risking criminal prosecution for refusing to submit to such a test.

---

[16] *See generally* Brief *Amicus Curiae* of Gun Owners of America, *et. al.* in City of Los Angeles v. Patel (No. 13-1175) (Jan. 30, 2015) http://www.lawandfreedom.com/site/firearms/Patel%20GOA%20Amicus%20Brief.pdf.

D. North Dakota's Reasonableness Claim Conflicts with the Fourth Amendment Property Principle.

After toying with a number of rationales, the North Dakota Supreme Court finally concluded that the state statute criminalizing refusals to submit to a breath, blood, or urine test for alcohol content did not violate the Fourth Amendment because the statute is "reasonable." *See discussion at* I.B. *supra*. In explanation, the court reasoned that "[c]riminally penalizing test refusal 'reduces the likelihood that drunk drivers will avoid a criminal penalty' by refusing to take a test and, therefore, it is 'reasonable because it is an efficient tool in discouraging drunk driving.'" *See* Birchfield Br. at 7. In order to sustain this argument, the North Dakota court dispensed with the Fourth Amendment's warrant requirement on the ground that "impaired driving is a serious societal problem." *See id.* at 9.

As Petitioner points out in his brief, however, the warrant requirement is not to be "'weighed' against the claims of police efficiency." *Id.* at 20. Indeed, the Fourth Amendment's "reasonableness" inquiry is not a general one, as if the question of the constitutionality of a "search and seizure" were akin to the "general reasonableness" issue submitted to a common law jury in an ordinary automobile accident case. Rather, the Fourth Amendment reasonableness test is tethered to its text, the foremost pertinent part of which reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." This text

prioritizes a person's legal interest in the security of his "person, house, paper or effect," prohibiting a person's property right to be overridden by a generalized need for safety upon the public highways. The Fourth Amendment warrant requirement is satisfied only by particularity in the place to be searched or persons or things to be seized. Otherwise, why would the Fourth Amendment's warrant clause require before issuance both "probable cause supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized"? Any other interpretation would open the door to the "condemned general warrant" which triggered the adoption and ratification of the Fourth Amendment. *See* Sources of Our Liberties 304-05, 427 (R. Perry & J. Cooper, eds., rev. ed., ABA Foundation: 1978).

According to the North Dakota court, the only individual interest protected by the Fourth Amendment is that of privacy. Even that expectancy is "diminished" "with respect to enforcement of drunk driving laws" in that such laws are based upon "implied consent" of drivers who use the public highways. Birchfield Br. at 24-25. But as noted above, since Jones and Jardines, the interests constitutionally protected by the Fourth Amendment are not foremost privacy expectations, but property rights. As Petitioner Birchfield described those rights here, "driving is not a voluntary commercial enterprise, but a necessary aspect of daily living" (Birchfield Br. at 26):

> Practically everywhere in the United States, and especially in heavily rural States like North Dakota, driving a car is necessary to get to town, commute to work, worship, see a doctor, or visit with friends and family. [*Id.* at 27.]

The modern notion that driving is a "privilege" and not a "right" is a legal fiction used to justify driver's licenses and vehicle registration, regulation, and inspection. But the scope of that legal fiction must not be so stretched as to swallow and destroy the Fourth Amendment.

Without the ability to drive a car without sacrificing one's liberties, productive commerce outside of urban areas served by main transit would cease. As Locke observed in his Second Treatise, what good is it for man to engage in productive labor to acquire:

> Ten Thousand, or a Hundred Thousand acres of excellent Land, ready cultivated, land well stocked too with Cattle in the middle of the inland parts of *America*, where he had no hopes of Commerce with other Parts of the World, to draw *Money* to him by the Sale of the Product? It would not be worth the inclosing, and we should see him give up again to the wild Common of Nature, whatever was more than would supply the Conveniences of Life to be had there for him and his family. [Locke § 48 at 301.]

Weighed against one's property rights in one's "person, houses, papers, and effects," the North Dakota statute

that criminalizes a driver's refusal to submit to a breath, blood, or urine test is unreasonable *per se*, unworthy of a nation that was founded on the principle that its government is dedicated to secure the God-given rights of life, liberty, and the pursuit of happiness.

CONCLUSION

For the foregoing reasons, the decisions of the Supreme Courts of Minnesota and North Dakota should be reversed.

Respectfully submitted,

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D Street, Ste. 2
Ramona, CA 92065
(760) 788-6624
Attorney for Amicus Curiae U.S. Justice Foundation

**Counsel of Record*

ROBERT J. OLSON
HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste.4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

February 11, 2016

Nos. 14-1470, 14-1468, 14-1507

In The Supreme Court of the United States

WILLIAM ROBERT BERNARD, JR.,
Petitioner,
v.
STATE OF MINNESOTA,
Respondent.

DANNY BIRCHFIELD,
Petitioner,
v.
STATE OF NORTH DAKOTA,
Respondent.

STEVE MICHAEL BEYLUND,
Petitioner,
v.
GRANT LEVI, DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,
Respondent.

On Writs Of Certiorari To The Supreme Court Of The State Of Minnesota And The Supreme Court Of The State Of North Dakota

BRIEF OF THE DUI DEFENSE LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DANIEL J. KOEWLER
Counsel of Record
RAMSAY LAW FIRM
2780 Snelling Avenue North,
Ste. 330
Roseville, MN 55113
(651) 604-0000
daniel@ramsayresults.com

TED VOSK
EVAN LEVOW
CHARLES RAMSAY
MIKE VANG
LINDA CALLAHAN
DUI DEFENSE LAWYERS ASSOCIATION

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED FOR REVIEW

Minnesota and North Dakota law makes it an independent crime for an individual to refuse to submit to a warrantless search of their blood, breath, or urine during a routine driving while intoxicated investigation. In this context, a divided Minnesota Supreme Court concluded that criminalizing the act of refusing to submit to a warrantless search is constitutional, under the rationale that an officer-compelled breath test is permissible under the search incident to arrest exception to the Fourth Amendment. The question presented is:

Whether it is constitutional to criminalize the act of refusing to submit to a custodial, warrantless search undertaken to determine an individual's alcohol concentration, and whether the search incident to arrest doctrine removes such searches from the protections of the Fourth Amendment.

This *amicus* brief also addresses a related question, namely, the coercive consequences for the "consent" exception to the Fourth Amendment warrant clause that stem from the passage and enforcement of such laws.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

I. Criminalizing The Act Of Passively Resisting To Warrantless Searches Ignores The Principles Underlying The Fourth Amendment As Such Laws Are Incredibly And Inescapably Coercive In Their Application 6

A. Laws Criminalizing The Act Of Passively Refusing To Submit To Warrantless Searches Are An Unconstitutional Attempt To Streamline Law Enforcement By Strong Arm Tactics 10

B. Minnesota's Application Of Its Test Refusal Law Perfectly Exemplifies The Fact That Test Refusal Laws Will Lead To A *Per Se* Consent Exception To The Fourth Amendment 16

C. Test Refusal Laws Co-opt Our Entire Adversarial System Of Criminal Justice, Coercing Defense Attorneys Into Acting As Agents Of The Executive 23

TABLE OF CONTENTS – Continued

Page

II. Laws Criminalizing The Act Of Passively Refusing To Submit To Warrantless Searches Serve No Valid Purpose Under Our Accusatorial System Of Justice 26

III. Laws Criminalizing The Act Of Passively Refusing To Submit To Warrantless Searches Do Not Make Our Roads Any Safer 32

CONCLUSION 37

APPENDIX INDEX

Bathen v. Comm'r of Pub. Safety, Not Reported in N.W.2d., 2014 WL 2178880 (Minn. Ct. App. May 27, 2014) ..... App. 1

Bjornoos v. Comm'r of Pub. Safety, Not Reported in N.W.2d., 2014 WL 2565685 (Minn. Ct. App. June 9, 2014) ..... App. 9

State v. Selle, Not Reported in N.W.2d., 2014 WL 2178838 (Minn. Ct. App. May 27, 2014) .... App. 13

TABLE OF AUTHORITIES

Page

CASES

UNITED STATES SUPREME COURT

Boyd v. U.S., 116 U.S. 616 (1886) 7, 8

Breithaupt v. Abram, 352 U.S. 432 (1957).....11

Brinegar v. U.S., 338 U.S. 160 (1949).....13, 14

Bumper v. North Carolina, 391 U.S. 543 (1968).....9, 16, 17

Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 (1940).....4, 7

Gideon v. Wainwright, 372 U.S. 335 (1963).....26

Illinois v. Krull, 480 U.S. 340 (1987) 9

Marbury v. Madison, 1 Cranch 137 (1803).....7

Maryland v. King, 133 S.Ct. 1958 (2013) 9

Mincey v. Arizona, 437 U.S. 385 (1978) 30

Missouri v. McNeely, 133 S.Ct. 1552 (2013) .....*passim*

New Jersey v. Garrity, 385 U.S. 493 (1967).....22

Olmstead v. United States, 277 U.S. 438 (1928).....12

Schmerber v. California, 384 U.S. 757 (1966) 17

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 17

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989).....11

South Dakota v. Neville, 459 U.S. 553 (1983).....28

Union Pac. R. Co. v. Pub. Serv. Comm'n of Missouri, 248 U.S. 67 (1918) 22

TABLE OF AUTHORITIES – Continued

Page

STATE COURTS

Bathen v. Comm'r of Pub. Safety, 2014 WL 2178880 (Minn. Ct. App. May 27, 2014).....19, 20

Bjornoos v. Comm'r of Pub. Safety, 2014 WL 2565685 (Minn. Ct. App. June 9, 2014).....20

Department of Revenue & Taxation v. Hull, 751 P.2d 351 (Wyo.1988).....5

Eastwood v. Wyoming Highway Dept., 76 Wyo. 247, 301 P.2d 818 (Wyo.1956).....6

Prideaux v. State, Dept. of Pub. Safety, 247 N.W.2d 385 (Minn.1976).....24

State v. Brooks, 838 N.W.2d 563 (Minn.2013) ....*passim*

State v. Netland, 762 N.W.2d 202 (Minn.2009) 17, 18

State v. Selle, 2014 WL 2178838 (Minn. Ct. App. May 27, 2014).....21

State v. Shriner, 751 N.W.2d 538 (Minn.2008).....17, 18

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV.....*passim*

STATUTES

2003 Minn. Sess. Law Serv. 1st Sp. Sess. Ch. 2 (May 2003).....36

2004 Minn. Sess. Law Serv. Ch. 283 (May 2004).....36

TABLE OF AUTHORITIES – Continued

Page

2011 Wyo. Sess. Laws, Ch. 39, § 2 (amending W.S. § 31-6-102(d)) 6

2011 Wyo. Sess. Laws, Ch. 178, §§ 1-3 (repealing W.S. § 31-6-107 and repealing W.S. § 31-6-105(f)) 6

Minn. Sess. Law Serv. Ch. 347 (May 1993) 36

Minn. Stat. § 169A.20, subd. 2 3

Minn. Stat. § 169A.51 3

Minn. Stat. § 169A.51, subd. 1(a) 28

Minn. Stat. § 169A.51, subd. 1(b) 13

Minn. Stat. § 169A.51, subd. 2(1)(2) 14

Minn. Stat. § 169A.51, subd. 6 28

Minn. Stat. § 169A.52 3

Minn. Stat. § 169A.78 25

N.D. Cent. Code, § 39-20-01 3

N.D. Cent. Code, § 39-20-01(3) 3

OTHER AUTHORITIES

2 Nichols, Drinking/Driving Litigation: Criminal and Civil § 20.01 5

Beauchamp, R., *'Shed Thou No Blood': The Forcible Removal of Blood Samples from Drunk Driving Suspects*, 60 S. Cal. L. Rev. 1115 (1987) 33

TABLE OF AUTHORITIES – Continued

Page

Berning, A., Beirness, D., et al. (November 2007), *Breath Test Refusals* (Report No. DOT HS 810 871), Washington, DC: National Highway Traffic Safety Administration 23, 34

Haire, E., Leaf, W., et al. (April 2011), *Use of Warrants to Reduce Breath Test Refusals: Experiences From North Carolina* (Report No. DOT HS 811 461), Washington, DC: National Highway Traffic Safety Administration 30, 35

Hedlund, J., and Beirness, D. (October 2007), *Search Warrants for BAC Test Refusals* (Report No. DOT HS 810 852), Washington, DC: National Highway Traffic Safety Administration 33, 34

James Otis, *Boston Gazette* (Jan. 4, 1762).....29

Minn.R.Prof.R. 8.4(e).....25

Minnesota Department of Public Safety, *Impaired Driving Facts 2012*, Office of Traffic Safety (August 2013) 23, 35

National Committee on Uniform Traffic Laws and Ordinances, UNIFORM VEHICLE CODE, "Foreword" pp. III-IV (Revised 1956).....6

Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 Ind. L.J. 979 (2011).....29

UVC § 6-205.1 (New 1962, Rev. ed. 1968) 3

UVC § 6-207(a) (Rev. and Renum. 1992) 3

UVC § 6-514(f) 5

TABLE OF AUTHORITIES – Continued

Page

UVC § 11-902(a) (Rev. eds. 1962, 1968, 1992) 3

UVC § 11-903(a) (Rev. & Renum. 2000).....3

UVC § 11-904(a) (Rev. & Renum. 2000).....3

INTERESTS OF THE *AMICUS CURIAE*[1]

Amicus Curiae DUI Defense Lawyers Association (DUIDLA) has a strong interest in the promulgation and enforcement of fair and constitutional DUI laws that create a safe society while protecting the civil liberties of our populace.

Its mission is to protect and ensure by rule of law those individual rights guaranteed by the state and Federal Constitutions in DUI-related cases; to resist the constant efforts which are being made to curtail these rights; to encourage cooperation between lawyers engaged in the furtherance of these objectives through educational programs and other assistance; to serve as the first and last line of defense of the Constitution; to assist attorneys and public defenders in obtaining advanced training in DUI-related areas through our education scholarship grants.

The DUIDLA is concerned with the practical problems presented to law enforcement, judges, defense attorneys, and the general public in states where the legislatures have criminalized the very act of saying no to a warrantless, and thus presumptively

---

[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

illegal, search. This is especially true when such searches implicate the integrity of the human body, with all of the concerns with privacy and dignity associated with such searches. Such laws critically undermine the very concept of "free and voluntary consent" and lead us down a very slippery slope where legislatures (pressured by voters) and agents of the executive (concerned primarily with investigating and prosecuting crimes) become the branches of government that make determinations regarding whether or not a suspect has truly "consented" to a Fourth Amendment search, usurping the role of the judiciary in defining the scope of what does and does not qualify as consent for the purposes of criminal investigations undertaken outside of the formal warrant process.

SUMMARY OF THE ARGUMENT

The consolidated appeals in this matter involve application of North Dakota's and Minnesota's implied consent laws, which are designed to coerce drivers into forgoing their rights under the Fourth Amendment warrant clause whenever an individual is suspected of operating a motor vehicle while impaired by alcohol or drugs. The results of these warrantless searches – blood tests, urine tests, and breath tests – are admissible in any criminal trial

and are also utilized in any civil license revocation process put in place by the legislature.[2]

If a person refuses to comply with the request for a biological sample pursuant to Minnesota's and North Dakota's implied consent laws, then these States impose a civil, administrative sanction against the driver's license or driving privileges, while permitting the act of refusal to be used against the driver in any criminal trial . . . but Minnesota and North Dakota also attach a purely criminal penalty to the refusal, treating it as an entirely new offense almost entirely divorced from the underlying offense of arrest.[3]

---

[2] Minn. Stat. § 169A.51 (implied consent law); N.D. Cent. Code, § 39-20-01 (implied consent law); *see also*, UVC § 6-205.1 (New 1962, Rev. ed. 1968); UVC § 6-207(a) (Rev. and Renum. 1992); UVC § 11-904(a) (Rev. & Renum. 2000) (implied consent provisions); UVC § 11-902(a) (Rev. eds. 1962, 1968, 1992); UVC § 11-903(a) (Rev. & Renum. 2000) (admissibility of chemical test provisions).

[3] Minn. Stat. § 169A.20, subd. 2 ("It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license."); N.D. Cent. Code, § 39-20-01(3) ("The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs; refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence. . . .").

This *amicus* brief is not about whether or not a breath test used to determine a person's alcohol concentration qualifies as a "search incident to arrest." It will not address the slippery slope being graded by such a law, opening the door to a variety of "search refusal" laws and effectively manufacturing crime whenever an individual attempts to exercise the right to demand a warrant from a neutral magistrate before submitting to an invasion of his or her privacy.[4]

This brief will address the other side of the coin being presented to this Court, the rationale behind legislatures passing test refusal laws such as those that were enacted in North Dakota, Minnesota, and in other states. It is doubtful that the purpose behind these types of test refusal laws is to truly manufacture criminals (although this is one of the results of such a law). No, the purpose of such a law is more blatant, and if possible, more base; such laws are designed to circumvent the Fourth Amendment by simply coercing the individual faced with such a law into giving up their rights of their own accord.

A minority of our states have crossed the Rubicon and outright criminalized the act of refusing

---

[4] "And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny." *Chambers v. State of Florida*, 309 U.S. 227, 241 (1940).

to submit to a warrantless search for evidence of impairment. The drafters of the most recent version of the UNIFORM VEHICLE CODE (UVC) noted: "[m]ost states do not consider 'refusal' a criminal offense. Therefore, it should be clarified that 'refusal to submit to a test' is not criminal in nature."[5] The criminal/civil distinction is important, where the Court is applying due process to balance the protected life, liberty or property interests under civil standards contrasted with the judicial scrutiny applied to the infringement of fundamental rights in a criminal case.

Because implied consent proceedings are considered administrative sanctions, the implied consent law is viewed as "'[p]urely administrative and separate from any traffic or criminal drinking/driving infraction even though the implied consent law and the law defining drinking/driving offenses may be contained in the same statute.'"[6]

Although many provisions of the UVC were adopted "practically verbatim" by the States, Congress resisted mandating a FEDERAL TRAFFIC CODE, "[because] voluntary action by the States is slower but much better because more consistent with the basic

---

[5] UVC § 6-514(f), pp. 91-92, n. 58 (Rev. 2000).

[6] *Department of Revenue & Taxation v. Hull*, 751 P.2d 351, 356 (Wyo.1988) (*quoting* 2 Nichols, Drinking/Driving Litigation: Criminal and Civil § 20.01, Ch. 20 at 3).

principles of our republic."[7] Minnesota and North Dakota's refusal laws are examples of state experimentation that goes beyond the UVC's recommendations.[8]

ARGUMENT

I. Criminalizing The Act Of Passively Resisting To Warrantless Searches Ignores The Principles Underlying The Fourth Amendment As Such Laws Are Incredibly And Inescapably Coercive In Their Application.

Our founding fathers were guided by several fundamental theories of justice when they established our country and crafted our constitution. An adversarial system of justice was implemented, accusatorial in nature, resting on the premise that the government bears the burden of both obtaining evidence and

---

[7] *National Committee on Uniform Traffic Laws and Ordinances*, UNIFORM VEHICLE CODE, "Foreword" pp. III-IV (Revised 1956); *but see*, *Eastwood v. Wyoming Highway Dept.*, 76 Wyo. 247, 262, 301 P.2d 818, 824 (Wyo.1956) (finding that Wyoming "[l]egislature had adopted sections of uniform vehicle codes piecemeal and in desultory fashion, instead of considering comprehensive legislation based upon the wide array of material available on the subject. . . .").

[8] *Cf.*, 2011 Wyo. Sess. Laws, Ch. 39, § 2. (amending statutory refusal provision of W.S. § 31-6-102(d) to allow for telephonic warrant); 2011 Wyo. Sess. Laws, Ch. 178, §§ 1-3 (repealing suspension associated with refusal under former W.S. § 31-6-107 and repealing the admission of refusal into evidence pursuant to former W.S. § 31-6-105(f)).

establishing guilt beyond a reasonable doubt with what evidence they obtained. Under an accusatorial system the government must establish guilt by evidence independently and freely secured, and cannot rely upon coercion to prove its charge against an accused. *Chambers v. State of Florida*, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 (1940).

Under such a system, the overwhelming power of the executive *vis a vis* any individual accused is apparent and obvious, and so in response to the threat of tyranny our justice system includes a Bill of Rights, a series of checks against executive and legislative actions; since *Marbury v. Madison*, 1 Cranch 137 (1803) it has been the role and duty of the judiciary to enforce the protections of the constitution when the executive and legislative branches fail in their own oaths.

One of these checks, one of the cornerstones of a free society, rests in the Fourth Amendment. The driving force behind the Fourth Amendment stemmed largely from the indiscriminate use of general warrants and writs of assistance in colonial times by the British government. This Court need not be given an exhaustive history of the Fourth Amendment; Fourth Amendment jurisprudence since the founding of our country has provided that background for all who are interested. *See, e.g., Boyd v. U.S.*, 116 U.S. 616, 625 (1886) (discussing practice of issuing writs of assistance, and noting that such a practice constituted "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental

principles of law, that ever was found in an English law book" since they placed "the liberty of every man in the hands of every petty officer").

Concerns with all restrictions to the scope of protection provided by the Fourth Amendment stem from very rational concerns about decent down a slippery, totalitarian slope. Justice Bradley expounded upon concerns for how limitations and exceptions to fundamental rights can, over time, lead to more significant infringements than may have first been contemplated:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd v. U.S.*, 116 U.S. at 635.

Throughout that history of Fourth Amendment jurisprudence – over two hundred and fifty years of interpretation and explanation – the most notable and noble attempts to remind us all of what divides a

free society from a police state have come not from the majority opinions issued by this Court . . . but from the **dissents**. *Maryland v. King*, 133 S.Ct. 1958, 1981 (2013) (Scalia, J., dissenting) (recounting a brief history of the drafting of the Fourth Amendment as chiefly being driven by opposition to general warrants); *Illinois v. Krull*, 480 U.S. 340, 362-364 (1987) (O'Connor, J., dissenting) ("Statutes authorizing unreasonable searches were the core concern of the Framers of the Fourth Amendment. . . . Indeed, as noted, the history of the Amendment suggests that legislative abuse was precisely the evil the Fourth Amendment was intended to eliminate").

The dissents issued by this Court throughout history emphasize why this case, under these facts, cannot be yet another vehicle for an apologetic dissent explaining to the populace why the government is now allowed to use criminal statutes to coerce "consensual" searches from individuals with no regard for the Fourth Amendment. For while consent is a valid exception to the warrant requirement, such consent must be freely and voluntarily given. *Bumper v. North Carolina*, 391 U.S. 543, 548-549 (1968). Should this Court strike down the test refusal laws in this case, it would be of incredible benefit to the various states to clarify the holding issued in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) and emphasize that while drivers can (and do) freely and voluntarily consent to warrantless searches in DWI investigations, imposing excessive penalties on drivers for withholding such consent will always render

such "consent" nothing more than acquiescence to claims of lawful authority . . . and therefore unconstitutionally coerced.

A. Laws Criminalizing The Act Of Passively Refusing To Submit To Warrantless Searches Are An Unconstitutional Attempt To Streamline Law Enforcement By Strong Arm Tactics.

The constitutional requirement that invasions of individual privacies can occur only under the guise of a warrant issued by a neutral magistrate (or within the context of a carefully crafted exception to this requirement) provides a carefully crafted balance between the needs of law enforcement and the rights of those they are sworn to serve and protect. The Fourth Amendment makes enforcement of our laws more difficult because *it was specifically designed as a check against unbridled freedom of action by the executive*. Without doubt, an unrestrained effort by law enforcement agents to "crack down" on drunken drivers, regardless of the constitutionality of the methods used, would reduce the number of annual incidents of these types. The Fourth Amendment was designed to prevent such excesses, as Justice Marshall explained in one dissent:

> "[C]onstitutional rights have their consequences, and one is that efforts to maximize the public welfare, no matter how well intentioned, must always be pursued within constitutional boundaries. Were the police freed

> from the constraints of the Fourth Amendment for just one day to seek out evidence of criminal wrongdoing, the resulting convictions and incarcerations would probably prevent thousands of fatalities. Our refusal to tolerate this specter reflects our shared belief that even beneficent governmental power – whether exercised to save money, save lives, or make the trains run on time – must always yield to 'a resolute loyalty to constitutional safeguards.' The Constitution demands no less loyalty here." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 650 (1989) (Marshall, J., dissenting).

Decades earlier, when dealing with the question of involuntary blood draws for unconscious suspects, Justice Douglas noted in his own dissent that:

> "If law enforcement were the chief value in our constitutional scheme, then due process would shrivel and become of little value in protecting the rights of the citizen. But those who fashioned the Constitution put certain rights out of the reach of the police and preferred other rights over law enforcement." *Breithaupt v. Abram*, 352 U.S. 432, 442-443 (1957) (Douglas, J., dissenting).

Good intentions do not make for good exceptions to our constitutional protections; instead they often do little more than provide thin rationales for unnecessary curtailments of fundamental rights. Thus, Justice Brandeis dissented:

> "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

This statement about the "greatest dangers to liberty" describes the underpinning of these test refusal laws; the well-meaning, sometimes zealous attempts to eliminate as many drunk drivers from our roads as is possible. The goal is a society where nobody dies needlessly to a drunk driver . . . but the reality is that a test refusal law accomplishes nothing more than ingraining into the population that demanding a warrant can be treated as a criminal act, that rights once considered sacred (and outright taken for granted) cannot be exercised without the risk of further exposure to additional penalties.

Justice Jackson, freshly returned from post-war Germany as Chief American Prosecutor at Nuremberg, may have penned the most compelling dissent regarding the importance of the Fourth Amendment as a bulwark against tyranny. He witnessed first-hand what Justice Marshall described as the urge to "make the trains run on time" and the effects of such a desire on the rule of law:

> "Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police." *Brinegar v. U.S.*, 338 U.S. 160, 180-181 (1949) (Jackson, J., dissenting).

In Minnesota, law enforcement need only articulate probable cause to believe a driver is impaired by alcohol (a very, very minimal burden) in order to invoke the test refusal law. Minn. Stat. § 169A.51, subd. 1(b) (test required upon officer's belief that he or she has developed probable cause). This is not a judicial determination of probable cause; this is the decision of the officer on the scene, the agent of the executive responsible for zealously enforcing the laws. It is one thing for a driver to say "no" to a blood, breath, or urine test, and then be faced with a warrant issued by a neutral magistrate. It is quite another for that driver to say "no" (or "do you have a warrant?") to an intrusion into her very body and be told that she just committed a new criminal act.

Over time, laws like these simply impress upon the population that the very concept of "consent" is not what they were raised to believe, and in fact flies in the face of logic and reason. Minnesota drivers are told that "Minnesota law requires you to take a test" and that "refusal to take a test is a crime." Minn. Stat. § 169A.51, subd. 2(1)(2). When they follow what the law "requires" of them, in order to avoid the crime of refusal, they are later told in court that they "freely and voluntarily consented" to law enforcement's demand to execute a warrantless search.

That is the most egregious consequence of such laws; free individuals being told that they consented to a search, even though they only agreed to submit to such searches after being told that failure to consent was a criminal act. That is how Minnesota ended up with the case of *State v. Brooks*, 838 N.W.2d 563, 571 (Minn.2013), which concluded that Minnesota's test refusal law was not coercing drivers into consenting . . . it was actually *encouraging* a free and voluntary choice by advising drivers that they had the "choice" to either submit to testing or commit the crime of refusal!

The end result of such a scheme is that the State obtains the evidence it wants without worrying about a driver's privacy concerns, and the driver experiences the feeling described by Justice Jackson: "human personality deteriorates and dignity and self-reliance disappear." *Brinegar*, 338 U.S. at 180-181. The driver "deserves" to be pierced by a needle, forced to urinate in the presence of an officer, yelled at while trying to

exhale as much breath as possible into a tube, and not because a judge determined that there was probable cause for such investigatory antics. The driver "deserves" such treatment because 1) the officer who arrested her decided there was a chance she was over the legal limit, and 2) the driver *herself* gave "free and voluntary consent" to the search, consent that was extracted upon the threat of committing another stationhouse crime should that consent be withheld.

The cases before this Court highlight the concerns raised by numerous dissenting justices, cited *infra*, over the past century. These cases present this Court with troubling circumstances; an institutionalized practice of executing a type of custodial, warrantless search that heavily implicate the privacy concerns inherent in the human body; a legislature that has passed a law criminalizing the act of even attempting to refuse to submit to such a search; and a state court system that spent decades bound and determined to craft some sort of *per se* exception to the Fourth Amendment that could legitimize the practice of criminalizing an individual's demand for a warrant.

If coercing individuals into forgoing a core constitutional right becomes the norm, that right no longer exists. When the government is allowed to use its authority to convince the population that *suspected* criminals will become *actual* criminals the minute they try to impede an investigation that implicates fundamental privacy rights, the role of a neutral

magistrate in the warrant process is abdicated, replaced by the sole discretion of law enforcement.

Bernard and its companion cases are not the type of cases that can tolerate yet another artfully worded and historically accurate dissent, explaining to Americans why it is unfortunate that This Court has authorized our legislatures to pass criminal laws that are wholly designed to coerce the population into waiving rights that constitute the core of our criminal justice system. In attempting to coerce Minnesotans into waiving the fundamental right to a warrant by passing a test refusal law, Minnesota (and other states that have followed suit) crossed the Rubicon in an extreme and unconstitutional manner. Under such a scheme, our accusatorial system transitions into an inquisitory one, manufacturing criminal acts for those individuals still interested in exercising the longstanding right to demand a warrant, and rendering the need for neutral magistrates to issue warrants in investigations moot and superfluous.

B. Minnesota's Application Of Its Test Refusal Law Perfectly Exemplifies The Fact That Test Refusal Laws Will Lead To A *Per Se* Consent Exception To The Fourth Amendment.

The principal peril that comes from the act of criminalizing the refusal to submit to a warrantless search is the impact such laws have on the very concept of "free and voluntary consent." In *Bumper v. North Carolina*, 391 U.S. 543, 548-549 (1968) this

Court recognized that when an officer claims the lawful authority to execute a search, and a suspect does no more than acquiesce to this claim of lawful authority, any agreement to that search was irrefutably coerced. "The situation is instinct with coercion – albeit colorably lawful coercion. Where there is coercion, there cannot be consent." *Bumper*, 391 U.S. at 550. In that case, this Court created a *categorical* exception to the general rule that consent to warrantless searches is to be analyzed under a "totality of the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). Instead of relying on the totality of the circumstances in *Bumper*, this Court rightly concluded that any claim of lawful authority by law enforcement automatically renders any following "consent" to have been coerced.

Prior to 2013, when this Court issued its decision in *Missouri v. McNeely*, Minnesota's Fourth Amendment jurisprudence had completely removed any thought of warrants from the minds of law enforcement officers executing searches during driving while impaired investigations. Based on a misreading of the *Schmerber v. California* case (384 U.S. 757 (1966)), Minnesota operated on the assumption that there was always a *per se* exigency that absolved law enforcement from obtaining a warrant in any DWI case. *State v. Netland*, 762 N.W.2d 202, 214 (Minn.2009) (holding the rapid dissipation of alcohol through the body created a *per se* exigency, an exception to the warrant requirement in breath test cases); *State v. Shriner*, 751 N.W.2d 538, 549 (Minn.2008) (same, as

applied to blood test cases). In 2013, this Court issued its decision in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), abrogating Minnesota's *Netland-Shriner* line of cases and rejecting any claims of a *per se* exception to the warrant requirement in DWI investigations.

Six months after *McNeely*, in the case of *State v. Brooks*, 838 N.W.2d 563, 568-569 (Minn.2013), the Minnesota Supreme Court addressed the concept of consent when law enforcement demands a urine sample from a DWI suspect. The *Brooks* Court made two things clear: that it was not impermissibly coercive to inform a suspect that "Minnesota law requires you [to submit to a warrantless search]" *and* that it was constitutionally acceptable to inform that same suspect that refusing to consent to a warrantless search would be treated as a criminal act. *Id.* The ultimate holding in *Brooks* went one step farther, and held that a suspect's acquiescence to the demand to execute a warrantless search, even after being presented with this ultimatum coupled with a threat, was nevertheless the equivalent of "free and voluntary consent."

The decision of the *Brooks* Court to treat an ultimatum and a threat as a meaningful "choice" was not based on any established United States Supreme Court precedent. The decision also paid lip service to the well-established principle that judicial review of a warrantless search purportedly executed with the suspect's consent must be analyzed under the "totality of the circumstances." *Id.* at 568.

However, the reality could not be further from the truth, because in Minnesota, the Courts have used the test refusal law as an excuse to adopt what is effectively a *per se* consent exception to the warrant requirement. Since the *Brooks* decision was issued, the Minnesota Court of Appeals has decided well over 70 appeals from district court cases dealing with the issue of consent. Every single one of those cases has concluded that the driver freely and voluntarily consented to a custodial, warrantless search of their blood, breath, and/or urine. In at least 24 cases, the Court of Appeals has upheld the district court's conclusion that a driver's consent was free and voluntary, under an astounding array of factual scenarios. *See, e.g.*, *Bathen v. Comm'r of Pub. Safety*, Not Reported in N.W.2d., 2014 WL 2178880 (Minn. Ct. App. May 27, 2014) (driver "freely and voluntarily consented" to an in-custody, warrantless search even though the driver had a police dog sicced on him, was repeatedly punched in the head by one police officer and repeatedly punched in the leg by another police officer, and had previously refused to answer Mirandized questions). App. 2-3, 5-6.

In the *Bathen* case, the Court of Appeals drew the absurd distinction that, "[t]hese police actions were an attempt to coerce Bathen to submit to their authority to take him into custody, not to submit to a breath test. Bathen does not explain how they had any effect on his ability to refuse a breath test." App. 7. Just so – the Minnesota court concluded that there was not "any effect" on Bathen's decision to submit to

a warrantless search after being beaten by police officers and bitten by a police dog. In fact, the Court of Appeals concluded that Bathen's "uncooperative conduct" demonstrated "his fortitude to resist lawful police directives and requests despite knowing that police prefer that he comply and despite knowing of the potential consequences of noncompliance." App. 8.

Minnesota's use of its test refusal law to craft a *per se* consent exception to the Fourth amendment is continually solidified not just by upholding district courts concluding that every suspected drunk driver in the state consents to every warrantless search for alcohol concentration . . . but carries over to the more than 43 cases where the Court of Appeals has unanimously concluded that the district court erred every time it found that the State had failed to meet its burden to prove that a driver's consent was freely and voluntarily given. Again, without fail, the Court of Appeals has reversed every district court judge who found that, under the totality of the circumstances, a driver was coerced into consenting. *See, e.g.*, *Bjornoos v. Comm'r of Pub. Safety*, Not Reported in N.W.2d., 2014 WL 2565685 (Minn. Ct. App. June 9, 2014) (district court found that a driver was coerced into submitting to a custodial, warrantless search of his blood, where the driver was not only told that he was required by law to submit to testing, but actually managed to initially refuse to submit to testing before later agreeing to a blood test; Court of Appeals reversed the district court and concluded that the

driver's custodial change of heart was not coerced) App. 11; *State v. Selle*, Not Reported in N.W.2d., 2014 WL 2178838 (Minn. Ct. App. May 27, 2014) (district court concluded that appellant did not freely and voluntarily consent, in part because he openly told the officer he did not understand the beginning of the Minnesota Implied Consent Advisory but that he would be "fighting it in a court of law . . . "; Court of Appeals concluded that the appellant consented "as a matter of law.") App. 22.

That is a phrase that runs through many of these decisions, the conclusion that drivers are "consenting" to the execution of warrantless searches "as a matter of law." Each of these drivers is told that they are required by law to submit to a search, and that refusal is a crime . . . and in Minnesota, our highest court has concluded that such advice is not only uncoercive, but is actually the opposite, supporting the conclusion that a driver freely and voluntarily consented to a warrantless search – because the "police made clear to him that he had a choice whether to submit to testing." *State v. Brooks*, 838 N.W.2d 563, 571 (Minn.2013).

To date, 100% of all Minnesota drivers who have reached the appellate level of review in Minnesota have been found to have freely and voluntarily consented to presumptively illegal, warrantless, custodial searches. Every district court judge who found free and voluntary consent has been upheld on appeal; every district court judge who found that a driver's

consent was coerced has been reversed on appeal. Every single one.

Under Minnesota's test refusal law, the courts have adopted a *per se* consent exception to the Fourth Amendment to replace the *per se* exigency exception rejected by this Court in *Missouri v. McNeely*. The claim is that drivers are not "coerced" but are merely offered a "choice" was addressed by Justice Holmes, in *Union Pac. R. Co. v. Pub. Serv. Comm'n of Missouri*, when this Court held careful examination of the topic of consent and "choices," leads to the obvious conclusion that "as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by threat of penalties worse than it in case of failure to accept it, and then to declare the acceptance voluntary." *Union Pac. R. Co. v. Pub. Serv. Comm'n of Missouri*, 248 U.S. 67, 70 (1918).

Again, in *New Jersey v. Garrity*, 385 U.S. 493, 499 (1967), this Court analyzed the concept of consent and noted, "Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other * * * * It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." (*citing Union Pac. R. Co. v. Pub. Serv. Comm'n of Missouri*, 248 U.S. at 70).

While we must assume that the Minnesota Supreme Court had no interest in setting up a police

state for the citizens of Minnesota, the *Brooks* decision currently uses Minnesota's test refusal law to establish a doctrine of *per se* consent whenever a driver says "yes" to a warrantless search of their blood, breath, or urine – after telling these drivers they are required by law to "consent" and that refusal to consent is a criminal act. This is contrary to every single rationale for adopting the Fourth Amendment espoused at the time of the founding of our nation.

C. Test Refusal Laws Co-opt Our Entire Adversarial System Of Criminal Justice, Coercing Defense Attorneys Into Acting As Agents Of The Executive.

Should this Court conclude that it is constitutional to pass a law criminalizing the act of refusing to submit to a warrantless search, it is certain that every legislature in the nation will stand up and take notice, and the experience in Minnesota and North Dakota will be repeated across the country. In 2012, 13% of Minnesotans arrested for DWI refused to submit to a search to uncover alcohol concentration evidence. Minnesota Department of Public Safety, *Impaired Driving Facts 2012*, Office of Traffic Safety (August 2013).[9] Because law enforcement in Minnesota,

---

[9] Berning, A., Beirness, D., et al. (November 2007), *Breath Test Refusals* (Report No. DOT HS 810 871), Washington, DC: National Highway Traffic Safety Administration. (NHTSA noted that its "major finding" was the "relatively small change in the refusal rate in the nation since 2001, and since 1987." *Id.* at 3).

as a matter of policy, do not obtain warrants in DWI investigations, this means that well over 80% of all arrestees "consented" to a warrantless search of their blood, breath, or urine – after being explicitly told by the same law enforcement agents that arrested them and transported them out of the public eye into the depths of a nearby jail that they *had* to consent, or they would be committing *a new crime, in the stationhouse, in the presence of law enforcement.*[10]

The vast majority of drivers are not only being coerced into submitting to warrantless searches under such laws, but the role of defense counsel is being critically undermined. In Minnesota, test refusal is not only a crime, but another statute makes it a crime to "aid and abet" any attempt to refuse

---

[10] Prior to this Court's decision in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), Minnesota's Supreme Court noted, "The obvious and intended effect of the implied-consent law is to coerce the driver suspected of driving under the influence into 'consenting' to chemical testing, thereby allowing scientific evidence of his blood-alcohol content to be used against him in a subsequent prosecution for that offense." *Prideaux v. State, Dept. of Pub. Safety*, 247 N.W.2d 385, 388 (Minn.1976). After the *McNeely* decision, the Minnesota Supreme Court was asked to conclude that advising drivers that "refusal to submit to testing is a criminal act" was unconstitutionally coercive; the Court concluded that such an advisory actually gives "those who drive on Minnesota roads a *right to refuse the chemical test*" and therefore *supports* the conclusion that a driver freely and voluntarily consented to a warrantless search – because the "police made clear to him that he had a choice whether to submit to testing." *State v. Brooks*, 838 N.W.2d 563, 571 (Minn.2013) (emphasis added).

to submit to testing. Minn. Stat. § 169A.78 (anyone who willfully induces, permits, or directs another to violate the test refusal law is "likewise guilty of that offense"). A defense attorney, upon receiving a late night phone call from a client who just caused a traffic accident and is being held in custody, cannot even advise his client to demand a warrant prior to submitting to a blood test. Such advice is a criminal act in Minnesota, as it is inducing another to violate the test refusal law.

Advising a client to invoke his or her Fourth Amendment rights will not only open a defense attorney up to criminal punishment, but may result in disbarment; laywers have an ethical duty to not advise their clients to break the law, or engage in conduct that is prejudicial to the administration of justice. Minn.R.Prof.R. 8.4(e). This provision mimics the Model Rules of Professional Conduct promulgated by the American Bar Association, and applies in one capacity or another across the United States.

Our adversarial and accusatorial system of justice gives the state great power to enforce our laws; that power is deliberately checked by the fact that the awesome power to search a person or a home is restricted in that a neutral magistrate, not the law enforcement agent on the scene, is responsible for determining if, when, and how that power is executed. In this system, defense lawyers act as a final check on all players, ensuring that private citizens are not sent as lambs to the slaughter before the "vast sums of money" spent by our governments "to

establish machinery to try defendants accused of crime." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

When the right to say "get a warrant" is compromised by the threat of criminal sanctions, and lawyers can do nothing but advise their clients to "consent" unless they wish to risk their own freedom and legal license, tyranny reigns supreme and our accusatorial system becomes an inquisitorial one, our adversarial system becomes one geared entirely towards ignoring rights once protected by our Constitution.

II. Laws Criminalizing The Act Of Passively Refusing To Submit To Warrantless Searches Serve No Valid Purpose Under Our Accusatorial System Of Justice.

Criminalizing a constitutional right, namely the right to a warrant signed by a neutral magistrate before law enforcement may execute a search for incriminating evidence, cannot be an option available to our legislatures, regardless of the nature of the crime being targeted – the Bill of Rights is not that easily marginalized. Luckily, the state has many other time tested, fully constitutional methods for keeping our roads safe ... including the always available tool of simply gaining a conviction, before a jury of the driver's peers, for driving while impaired.

A law making it illegal to picket the funerals of servicemen would see broad support from all of those

who oppose the message of the Westboro Baptist Church, but would also destroy the fundamental right to freedom of speech that we have cherished for centuries. A law denying an attorney to those individuals charged with criminal sexual conduct against a minor would certainly improve the conviction rate against the alleged perpetrators of one of the most heinous crimes that can be committed, but would also destroy the fundamental right to counsel that we have embraced since the founding of our nation. A law imposing the death penalty by publicly televised stoning for all those who violate any term of their parole would undoubtedly reduce recidivism, but would also trivialize our long-standing protections against cruel and unusual punishments.

There are constitutional methods of reducing or eliminating the effects of hate speech, criminal sexual conduct, and recidivism without resorting to extreme shortcuts around the Bill of Rights. So, too, there are constitutional ways for us to remain members of a free society, a land governed by laws and not by men, and still work to address the problems faced by drunk drivers. As always, the State is entitled to bring to trial any case where there is probable cause to believe that a driver of a motor vehicle was impaired, or over the legal limit by weight of alcohol or presence of drug. Evidence at that trial can come from not only officer observation, but from direct testing – testing that was obtained pursuant to the constitutional warrant requirement. Some drivers may consent, others may find themselves in a situation that presents exigent circumstances, but in *every single case*

law enforcement must be ready to obtain a judicially-issued warrant to aid in the collection of evidence. This is their duty under the constitution.

There are other tools at the state's disposal as well: States can condition the operation of a motor vehicle and the issuance of a driver's license on the condition that a driver consent to testing if they are arrested or otherwise suspected of violating the conditions of that license. Minn. Stat. § 169A.51, subd. 1(a); *Missouri v. McNeely*, 133 S.Ct. 1552, 1566 (2013) (citing with approval the use of civil implied consent laws). This consent continues even if a driver is unconscious, or otherwise incapacitated. Minn. Stat. § 169A.51, subd. 6. Most importantly, this is a purely civil, regulatory sanction applied to a licensing scheme – not the criminal punishment of a constitutional right.

In the criminal context, the State can also use a driver's refusal against him at trial, without elevating that conduct to the level of an independent offense. *South Dakota v. Neville*, 459 U.S. 553, 554, 563-564 (1983). It is one thing for a driver to be convicted by a jury of his peers based upon the inference that his refusal constituted consciousness of guilt . . . and an entirely other thing for a driver to be convicted by a jury of his peers for the "crime" of telling an officer "get a warrant." The latter situation undermines faith in the constitution and erodes public confidence in the courts, making jurors the unwitting tools of a government that will specifically

instruct its citizens to return a finding of guilt based on a person's exercise of a constitutional right.

Of course, law enforcement always have the right to utilize the awesome power afforded by the warrant process. This has been the practice since general warrants were abolished via the Bill of Rights, and it is a practice that has only gotten easier over time. *Missouri v. McNeely*, 133 S.Ct. 1552, 1562 (2013) (describing technological advancements in obtaining and streamlining the warrant process). Long before the age of cell phones and video conferencing, James Otis argued against the issuance and use of writs of assistance by the British, where he decried the fact that such practices meant that, "every man ... [would] be liable to be insulted, by a *petty officer*, and threat[e]ned to have his house *ransack'd*, unless he will comply with his unreasonable and *imprudent* demands." Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 Ind. L.J. 979, 993-94 (2011) (quoting James Otis' January 4, 1762 article in the *Boston Gazette*). Under the scheme touted by North Dakota and Minnesota, the same situation arises: every driver, upon the barest suspicion of alcohol consumption or drug use, is liable to be coerced into submitting to blood, urine, or breath test; threatened by every petty officer unless he or she complies with demands that may or may not be reasonable, but are certainly unsanctioned by a neutral magistrate.

On the other hand, the use of these warrants, touted by National Highway Traffic Safety Administration

(NHTSA) as an effective method of ensuring convictions and obtaining evidence, shows a true respect for the limits imposed by the Constitution, and provides a solution that works with, not against, the rights of the individual. Haire, E., Leaf, W., et al. (April 2011), *Use of Warrants to Reduce Breath Test Refusals: Experiences From North Carolina* (Report No. DOT HS 811 461) Washington, DC: National Highway Traffic Safety Administration (noting that when law enforcement utilize warrants in DWI investigations drivers "understand their right to refusal does not terminate the ability of law enforcement to obtain BAC evidence. . . ." On the other hand, ignoring the warrant requirement, going so far as to criminalize the ability of our citizens to even rely upon it, goes a long way towards eroding any public faith in the judiciary and the administration of justice.

It is unquestionably more convenient for law enforcement agents to completely bypass the warrant requirement by simply charging those drivers who refuse to incriminate themselves with the crime of test refusal. Similarly, it undoubtedly makes it easier for prosecutors to gain convictions against those drivers who refuse to incriminate themselves when the only real question presented to the jury is not "was this driver impaired" but rather "did this driver refuse." However, this Court must constantly remember that the convenience of law enforcement and the ease of convicting individuals of crimes is not a valid basis for crafting an exception to the warrant requirement. *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)

("The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that [individual] privacy . . . may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law").

Nobody should face the possibility of being incarcerated solely because they refused to incriminate themselves through waiving their constitutional right to a warrant. Were this Court to uphold the decisions of the Minnesota and North Dakota Supreme Courts, the Upper Midwest would gain the dubious distinction of being among the first states to affirmatively sound the death knell of the Fourth Amendment, ushering in a new era where warrants are obtained at the convenience of law enforcement, and not at the command of the Constitution . . . because it is unequivocally easier to simply coerce drivers into providing "consent" to warrantless searches then exposing an investigation to second guessing by a neutral magistrate. Unrestrained search and seizure is the hallmark of a police state. In Justice Jackson's time, the difference between Stalin's Soviet Union, Hitler's Nazi Germany, and Roosevelt's United States of America was the ability for our countrymen to utter the phrase "get a warrant."

In this case, the Court is being asked to uphold the criminalization of the phrase "get a warrant," and because there is no reliable policy reason for doing so, this Court must uphold its oath and trust that our states can address the "carnage on the highways"

without resorting to unnecessary carnage to our constitution.

III. Laws Criminalizing The Act Of Passively Refusing To Submit To Warrantless Searches Do Not Make Our Roads Any Safer.

In any case involving drivers who are alleged to have operated a motor vehicle while impaired by drugs or alcohol, the government will cite to authority describing the "scourge" of drunk drivers and the "carnage" caused by them, before calmly reciting the state's legitimate goal in preventing as many deaths and as much destruction as possible. But anyone who has ever picked up a newspaper knows full well how much damage even one drunk driver can cause; such a blanket statement by a government attorney is no sane rationale for the destruction of individual liberties.

Here, even if the government's decision to criminalize a constitutional right has some symbolic value in the struggle to rein in drunk drivers, this provides no basis to support an unconstitutional law, even if the cause is indeed a worthy one. Furthermore, in the context of Minnesota's test refusal law it misses the mark, for there is evidence that criminalizing the act of refusal, instead of following the constitutionally mandated procedure of obtaining a warrant and executing a search, makes our roads *less* safe.

As was noted by one legal scholar, "[i]f . . . the state can further both its own interests in highway

safety and the individual's interests in personal integrity, the choice must favor the least intrusive, effective alternative." Beauchamp, R., *'Shed Thou No Blood': The Forcible Removal of Blood Samples from Drunk Driving Suspects*, 60 S. Cal. L. Rev. 1115, 1135 (1987). There *are* competing interests at stake, but only one of those interests is mandated by the Constitution – the right to see a warrant prior to the execution of a search by law enforcement. One question for this Court to consider is whether or not the state's interest in highway safety is even accomplished by criminalizing the exercise of the constitutional right to demand a warrant.

In 2007 the National Highway Traffic and Safety Administration (NHTSA) conducted a study to analyze the impact on drunk driving that results from the routine acquisition of warrants in DWI investigations. The study focused on four states that "use warrants extensively" – Arizona, Michigan, Oregon, and Utah – and sought to analyze the impact such a practice had on the rate of breath test refusals. Hedlund, J., and Beirness, D. (October 2007), *Search Warrants for BAC Test Refusals* (Report No. DOT HS 810 852), Washington, DC: National Highway Traffic Safety Administration. This study, which did nothing more than analyze the consequences of law enforcement *following the Constitution*, concluded that, "In each State, the people interviewed agreed that warrants have reduced breath test refusals and produced BAC evidence in more DUI cases. This in turn has produced more pleas, fewer trials, and more

convictions." *Id.* at 39. The study also noted the main disadvantage of addressing test refusals with warrants: cost. *Id.* However, the study pointed out that:

> "[m]any of the people interviewed regarded these costs as necessary and appropriate for acquiring critical evidence for the criminal DUI charge. Others pointed out that DUI trials are very expensive. If a warrant system increases guilty pleas and reduces trials, then they believe that these savings are greater than the warrant system's cost." *Id.*

The study added that both law enforcement generally supported the use of warrants and that prosecutors and many judges "strongly supported" the practice. *Id.* at 36.

NHTSA performed another review of test refusals across the United States and again proposed the common sense, time-honored tradition of using warrant-authorized blood draws to reduce the rate of test refusal. Berning, A., Beirness, D., et al. (November 2007), *Breath Test Refusals* (Report No. DOT HS 810 871), Washington, DC: National Highway Traffic Safety Administration. In 2005, Minnesota's rate of breath test refusals was 13% – higher than many states that did not criminalize the act of refusal, and lower than other states (like Alaska) who also make refusal a crime. *Id.* at 2. NHTSA noted that its "major finding" was the "relatively small change in the refusal rate in the nation since 2001, and since 1987." *Id.* at 3. In a different study, NHTSA concluded that implementing a procedure whereby warrants are

obtained against drivers who refuse to submit to testing can make it less likely that drivers will even try to refuse, because they "understand their right to refusal does not terminate the ability of law enforcement to obtain BAC evidence. . . ." Haire, E., Leaf, W., et al. (April 2011), *Use of Warrants to Reduce Breath Test Refusals: Experiences From North Carolina* (Report No. DOT HS 811 461), Washington, DC: National Highway Traffic Safety Administration.

Outside of government studies, we can consider the raw data regarding drunk driving incidents in Minnesota and compare those rates to the legislature's efforts at eliminating the constitutional right to a warrant. In evaluating the rate at which Minnesota drivers are reported to have committed impaired driving incidents in violation of Minnesota's DWI laws, the data demonstrates that Minnesota's rate hovers consistently around 30,000 annual criminal convictions and/or license revocations. Minnesota Department of Public Safety, *Impaired Driving Facts 2012*, Office of Traffic Safety (August 2013). From 30,088 reported incidents in 1993, impaired driving incidents peaked in 2006 with 41,951, and since that time have declined to 28,418. *Id.* at 2.

In 1993, the legislature amended Minnesota's DWI test refusal law to apply to any driver suspected of driving while impaired. Prior to that change, the crime of refusal only applied to drivers that had a previous impaired driving incident on their record; after these amendments, which went into effect on August 1, 1993, any driver who refused to submit to

testing could be charged with the independent crime of test refusal, and were advised of that fact as part of the standard Implied Consent Advisory. Minn. Sess. Law Serv. Ch. 347 (May 1993). From 1993 to 1998, after these changes were implemented, impaired driving incidents increased by approximately 2,000 (32,422).

By 2002, Minnesota reported 33,163 impaired driving incidents. In 2003, the legislature again amended the DWI laws to enhance the criminal consequences for test refusal, making the level of offense more severe for those who refuse a test versus those that failed a test, changes that went into effect August 1, 2003. 2003 Minn. Sess. Law Serv. 1st Sp. Sess. Ch. 2 (May 2003). 2003 saw 32,266 reported incidents, a slight decline from 2002, but saw an increase of approximately 2,000 incidents in 2004 (34,202). 2005 saw the rate of reported incidents increase again by approximately 3,000 (37,002). This rate went up yet again in 2006, when 41,951 incidents were reported. It was near the end of 2005 when the legislature amended the *per se* legal limit from .10 to .08. 2004 Minn. Sess. Law Serv. Ch. 283 (May 2004). These changes went into effect on August 1, 2005 – and since 2006, the reported rate of alcohol related incidents has steadily decreased.

That decrease occurred within a year of the legislature reducing the legal limit; compare this to the fact that incidents only *increased* after the legislature ratcheted up the consequences for test refusal. It cannot be said that higher penalties for refusal actually caused more people to attempt drunk driving, but it also cannot be said that increased test refusal

penalties did anything to reduce that rate. While these figures may also be affected by external factors, such as increased (or decreased) enforcement and/or reporting errors, the simple fact remains that there is no evidence that legislating away a driver's constitutional right makes our roads any safer. However, when law enforcement agents are trained on how to use the established warrant procedure, and then take advantage of that procedure, there is evidence that more convictions are obtained, and that our roads are made safer.

CONCLUSION

For all of the foregoing reasons, *amicus* DUIDLA respectfully requests that this Court reverse the decision of the North Dakota and Minnesota Supreme Courts, and clarify that test refusal laws are not only unconstitutional, but that they are also unconstitutionally coercive in cases where drivers purportedly "consent" to warrantless searches strictly to avoid being charged with additional crimes.

Respectfully submitted,

DANIEL J. KOEWLER
Counsel of Record
RAMSAY LAW FIRM
2780 Snelling Avenue North, Ste. 330
Roseville, MN 55113
(651) 604-0000
daniel@ramsayresults.com

Counsel for Amicus Curiae

2014 WL 2178880

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

Jonathon Joel BATHEN, petitioner, Appellant,

v.

COMMISSIONER OF PUBLIC SAFETY, Respondent.

No. A13-1902.

|

May 27, 2014.

Dakota County District Court, File No. 19AV-CV-13-1160.

Attorneys and Law Firms

Charles A. Ramsay, Daniel J. Koewler, Ramsay Law Firm, P.L.L.C., Roseville, MN, for appellant.

Lori Swanson, Attorney General, James E. Haase, Assistant Attorney General, St. Paul, MN, for respondent.

Considered and decided by BJORKMAN, Presiding Judge; HUDSON, Judge; and ROSS, Judge.

UNPUBLISHED OPINION

ROSS, Judge.

Police officers arrested Jonathon Bathen after police saw him driving erratically, fleeing from his

car, and hiding nearby. Bathen was taken to a detention center, read the implied consent advisory, and given the opportunity to contact an attorney. Bathen agreed to submit to a breath test, which revealed an alcohol concentration of .19 and caused his driver's license to be revoked. Bathen petitioned the district court for review. The district court found that Bathen had voluntarily consented to the breath test and affirmed the revocation. Because the district court's finding that Bathen's consent was voluntary is not clearly erroneous, we affirm.

FACTS

Early in the morning on April 14, 2013, Officer David Engel began following a car in Apple Valley after seeing it run a red light. The car swerved, struck a median, and veered back into its lane. Officer Engel activated his squad car's emergency lights. The car did not stop. It accelerated, went off the road and down an embankment, and hit a retaining wall. It continued through a parking lot and between two businesses and then abruptly stopped behind a building. Officer Engel saw a man later identified as Jonathon Bathen running from the car.

Badger, a police dog, led Officers Zachary Broughten and Andy Helgerson to a cluster of trees where they found Bathen lying on his stomach. Badger bit Bathen's left arm. Officer Helgerson ordered Bathen to stop fighting Badger. Officer Broughten grabbed Bathen's left arm near his wrist.

Bathen tensed his muscles and tried to pull away. The officers ordered Bathen to free his right arm. Bathen did not comply. Officer Broughten struck Bathen in the back and thigh three or four times while Officer Helgerson struck him in the upper body and face. Bathen finally gave up his right arm. Officers handcuffed Bathen, who smelled of alcoholic beverages, had red watery eyes, and slurred his words.

Officer Engel took Bathen to the Apple Valley detention center. Bathen had minor scrapes and scratches on his left arm. Medical personnel determined that he was fit to remain in custody. Officer Engel read Bathen his Miranda rights. Bathen indicated that he understood them and agreed to speak with Officer Engel without a lawyer. He told the officer that he had been picking someone up from a service station but denied he was driving. He would not say who was driving and refused to answer any more questions. Officer Engel read Bathen the implied consent advisory. Bathen said that he understood and wanted to speak with an attorney. Officer Engel gave Bathen access to a telephone and directories. Bathen made a call and then indicated that he was finished trying to contact an attorney. He then agreed to take a breath test, which revealed an alcohol concentration of .19.

The commissioner of public safety revoked Bathen's driver's license, and Bathen petitioned for judicial review. The district court held an implied consent hearing at which the parties presented no

live testimony and stipulated to the admission of police reports and test results. The only issue was whether *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), required the breath test results to be suppressed. The district court concluded that by voluntarily driving in Minnesota, Bathen had presumably consented to the breath test under the implied consent law. Bathen appeals.

DECISION

Bathen argues that the district court erred by denying his suppression motion because his breath test was an unreasonable search. We review for clear error the factual findings that underlie a district court's prehearing suppression order and determine as a matter of law whether the evidence should have been suppressed. *State v. Barajas*, 817 N.W.2d 204, 217 (Minn.App.2012), *review denied* (Minn. Oct. 16, 2012).

Both the United States and Minnesota Constitutions guarantee persons the right to be free from unreasonable searches. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Outside specifically established exceptions, warrantless searches are per se unreasonable. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967); *State v. Hanley*, 363 N.W.2d 735, 738 (Minn.1985). A breath test is a search under the Fourth Amendment. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616-18, 109 S.Ct. 1402, 1412-14 (1989); *State v. Netland*, 762 N.W.2d 202, 212

(Minn.2009), *abrogated on other grounds by Missouri v. McNeely*, 133 S.Ct. 1552 (2013).

Consent is one exception to the warrant requirement. *State v. Brooks*, 838 N.W.2d 563, 568 (Minn.2013), *cert. denied*,134 S.Ct. 1799 (2014)."For a search to fall under the consent exception, the State must show by a preponderance of the evidence that the defendant freely and voluntarily consented."*Id.* We examine the totality of the circumstances to determine whether consent is voluntary. *Id.* We consider the nature of the defendant's encounter with law enforcement, including "what was said and how it was said," and "the kind of person the defendant is."*Id.* at 569 (quotation omitted).

Bathen argues that his agreement to take the breath test was not free and voluntary. Whether consent was voluntary is a question of fact. *See Barajas*, 817 N.W.2d at 218. The district court found that "[t]here is no evidence that [Bathen's] will was overborne such that his consent was not validly made."It noted that Bathen was read the implied consent advisory, had the opportunity to consult with an attorney, and chose to submit to the test.

Bathen maintains that he was coerced because he was told, as part of the advisory reading, that "Minnesota law requires" him to take the test. *See*Minn.Stat. § 169A.51, subd. 2(1) (2012). He asserts that the supreme court did not address this portion of the advisory in *Brooks*.He misreads *Brooks*.The *Brooks* court concluded that reading the

advisory, which "informs drivers that *Minnesota law requires* them to take a chemical test for the presence of alcohol,""makes clear that drivers have a choice of whether to submit to testing."838 N.W.2d at 565, 570 (emphasis added). And it summarized the *McNeely* decision to highlight that requiring motorists to consent to testing as a condition of driving is a "*legal* tool." *Id.* at 572 (emphasis added).

Bathen also insists that his consent was involuntary because he never spoke to an attorney. The record does not specify whether Bathen contacted an attorney. The district court found and the record shows only that he was given access to a phone and directories, made a phone call, and indicated that he was finished trying to contact an attorney. Even assuming the call was unsuccessful, Bathen's alleged failure to contact an attorney is not dispositive. The supreme court did not rely on the fact that Brooks contacted an attorney to conclude that his consent to testing was voluntary. The supreme court instead agreed with the district court that "nothing in the record suggests that Brooks was coerced in the sense that his will had been overborne and his capacity for self-determination critically impaired."*Id.* at 571 (quotation omitted). Then it added, "The fact that Brooks consulted with counsel before agreeing to take each test *reinforces* the conclusion that his consent was not illegally coerced."*Id.* (emphasis added). This language in context suggests that the supreme court would not have decided differently even if Brooks had not consulted with counsel. The court reasoned, it is

"the *ability* to consult with counsel about an issue" that makes a subsequent decision more likely to be voluntary. *Id.* at 572 (emphasis added). Bathen, like Brooks, had "the ability to" contact an attorney before agreeing to testing. If Bathen chose not to take advantage of that opportunity, the opportunity was no less his.

Bathen next argues that his consent was involuntary because he was bitten and beaten during his arrest. We are unconvinced. Badger bit Bathen because Bathen fled and hid, and the officers used force during the arrest because he resisted their attempts to restrain him. These police actions were an attempt to coerce Bathen to submit to their authority to take him into custody, not to submit to a breath test. Bathen does not explain how they had any effect on his ability to refuse a breath test. Bathen was read his *Miranda* rights, permitted without any demonstration of police force to refuse to answer police questions, read the advisory, allowed to contact an attorney, and asked whether he would submit to testing. No evidence suggests that officers unconstitutionally pressured Bathen to be tested for alcohol concentration.

Bathen contended at oral argument that we should conclude his consent was involuntary because he had shown his unwillingness to give the police evidence that could be used against him. He points to his flight from police and his refusal to answer questions as evidence of this unwillingness. But Bathen's running and hiding and his refusal to answer

questions supports the district court's finding that he had *not* been coerced to submit to testing. This uncooperative conduct demonstrates his fortitude to resist lawful police directives and requests despite knowing that police prefer that he comply and despite knowing of the potential consequences of noncompliance.

The record evidence confirms the district court's finding that Bathen voluntarily chose to take the breath test. We need not consider the validity of the district court's rationale that Bathen's consent was presumed under the implied consent law because even without the presumption his consent is apparent.

Affirmed.

2014 WL 2565685

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

Joseph Robert BJORNOOS, petitioner, Respondent,

v.

COMMISSIONER OF PUBLIC SAFETY, Appellant.

No. A13-1767.

|

June 9, 2014.

Attorneys and Law Firms

Christopher Hanscom, Adkins Law Group, Chartered, Minneapolis, MN, for respondent.

Lori Swanson, Attorney General, Kristi Nielsen, Assistant Attorney General, St. Paul, MN, for appellant.

Considered and decided by BJORKMAN, Presiding Judge; ROSS, Judge; and REILLY, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge.

Appellant commissioner challenges the district court's rescission of respondent's driver's license revocation, arguing that respondent voluntarily consented to a blood test. We reverse.

FACTS

On January 24, 2013, respondent Joseph Bjornoos was arrested for driving while impaired. Police read Bjornoos the implied-consent advisory and he contacted two attorneys. Bjornoos initially refused to take a breath test, but later agreed to provide a blood sample that revealed an alcohol concentration of 0.20. Based on that result, appellant Minnesota Commissioner of Public Safety revoked Bjornoos's driver's license. Bjornoos moved the district court to review the revocation, and the parties stipulated to the facts in the police report. The district court rescinded Bjornoos's license revocation, holding that his consent was coerced under the implied-consent law. This appeal follows.

DECISION

Collection and testing of a person's blood, breath, or urine constitutes a search under the Fourth Amendment to the United States Constitution, requiring a warrant or an exception to the warrant requirement. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616-17, 109 S.Ct. 1402, 1412-13 (1989); *State v. Brooks*, 838 N.W.2d 563, 568 (Minn.2013), *cert. denied,*134 S.Ct. 1799 (2014). The exigency created by the dissipation of alcohol in the body is insufficient to dispense with the warrant requirement. *Missouri v. McNeely*, 133 S.Ct. 1552, 1561 (2013). But a warrantless search of a person's breath, blood, or urine is valid if the person voluntarily

consents to the search.*Brooks*, 838 N.W.2d at 568. The commissioner bears the burden of showing by a preponderance of the evidence that the driver freely and voluntarily consented. *Id.*

The voluntariness of Bjornoos's consent depends on "the totality of the circumstances," which we review independently. *See id.; see also State v. Harris*, 590 N.W.2d 90, 98 (Minn.1999) ("When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing . . . the evidence ."). The relevant circumstances include "the nature of the encounter, the kind of person the defendant is, and what was said and how it was said."*Brooks*, 838 N.W.2d at 569 (quoting *State v. Dezso*, 512 N.W.2d 877, 880 (Minn.1994)). The nature of the encounter includes how the police came to suspect the driver was under the influence, whether police read the driver the implied-consent advisory, and whether he had the right to consult with an attorney. *Id.* A driver's consent is not coerced as a matter of law simply because he or she faces criminal consequences for refusal to submit to testing. *Id.* at 570.

The commissioner argues that examination of the totality of the circumstances reveals that Bjornoos voluntarily consented to chemical testing. We agree. It is undisputed that police had probable cause to believe Bjornoos was driving while under the influence of alcohol. It also is undisputed that Bjornoos received an implied-consent advisory, which informed

him that he had the right to consult with an attorney and that refusal to submit to chemical testing is a crime. Bjornoos contacted an attorney, and because he was not satisfied with the conversation, he consulted a second attorney. He thereafter consented to a blood test. Bjornoos has not claimed, and there is no evidence indicating, that the police did anything to overcome Bjornoos's will or coerce his cooperation. He was not subjected to extensive questioning or held in custody for a prolonged time before being asked to provide a sample for chemical testing.

Overall, this record indicates that Bjornoos voluntarily consented to chemical testing of his blood. Because Bjornoos's consent justified the warrantless search, we conclude the district court erred by suppressing the test result and rescinding Bjornoos's license revocation.

Reversed.

2014 WL 2178838

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Appellant,

v.

Michael John SELLE, Respondent.

No. A13-1693.

|

May 27, 2014.

Hennepin County District Court, File No. 27-CR-12-30407.

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, MN; and Peter A. MacMillan, Michele Wallace, MacMillan, Wallace, Athanases & Patera, P.A., Minneapolis, MN, for appellant.

James M. Ventura, Wayzata, MN, for respondent.

Considered and decided by STAUBER, Presiding Judge; PETERSON, Judge; and HUDSON, Judge.

UNPUBLISHED OPINION

HUDSON, Judge.

In this pretrial prosecution appeal, the state argues that the district court erred by determining that the warrantless blood sample obtained from

respondent under the implied-consent law was unreasonable and unconstitutional. Because appellant voluntarily consented to the blood draw, we conclude that the search was not unreasonable, and we reverse and remand.

FACTS

On April 27, 2012, Crystal police officers investigating the scene of a motor vehicle collision observed that one of the drivers, respondent Michael John Selle, showed signs of impairment. The state alleged that officers detected the smell of marijuana coming from the open window of respondent's vehicle and observed that he was unsteady on his feet, agitated, and had slurred speech, body tremors, and dilated pupils. Respondent failed several field sobriety tests, but a preliminary breath test (PBT) did not detect the presence of alcohol. The officer transported respondent to the Crystal police station, where an officer administered a drug-influence evaluation (DRE). The officer concluded that respondent had operated a motor vehicle in violation of the driving-while-impaired (DWI) law and then read respondent the implied-consent advisory:

> OFFICER: All right, Mr. Michael John Selle, I believe you've been driving, operating or controlling a motor vehicle in violation of Minnesota's DWI law and you've been placed under arrest for this offense. Do you understand that?

RESPONDENT: No, I don't understand that, but I guess I'm gonna have to. I'll be fighting it in a court of law so.

OFFICER: Okay. Minnesota law requires you to take a test to determine if you are under the influence of a hazardous or schedule one through five controlled substance or to determine the presence of a controlled substance or its metabolite listed in schedule one or two, other than marijuana or tetrahydrocannabinols. Do you understand that?

RESPONDENT: Okay, read that again? (inaudible) THC and what?

OFFICER: Other than marijuana or tetrahydrocannabinols, do you want me to read the whole paragraph?

RESPONDENT: Yeah, so –

OFFICER: Minnesota law requires you to take a test to determine if you are under the influence of a hazardous or schedule one through five controlled substance or to determine the presence of a controlled substance or its metabolite listed in schedule one or two, other than marijuana or tetrahydrocannabinols.

RESPONDENT: (inaudible).

OFFICER: Refusal to take a test is a crime, [d]o you understand that?

RESPONDENT: Yeah.

OFFICER: Before making your decision about testing, you have the right to consult with an attorney. If you wish to do so, a telephone and directory will be available to you. If you aren't able to contact an attorney, you must make the decision on your own. You must make a decision within a reasonable period of time. Do you understand that?

RESPONDENT: Yeah, a reasonable amount of time is in like right now?

OFFICER: Yeah. If the test is unreasonably delayed, or if you refuse to make a decision, you will be considered to have refused this test. Do you understand that?

RESPONDENT: Yeah.

OFFICER: Do you understand what I just explained?

RESPONDENT: Yes, I do.

OFFICER: Do you wish to consult with an attorney?

RESPONDENT: Yes, I do.

Respondent attempted to call an attorney on his cell phone, but was unable to reach an attorney. After about three minutes passed, the officer asked respondent whether he wanted to proceed or whether he wanted to keep trying to reach an attorney. Respondent stated that he wanted to continue and confirmed that he was finished using the phone. The officer then asked respondent:

OFFICER: All right, will you take the urine test?

RESPONDENT: Blood test.

OFFICER: So you're saying no to the urine test?

RESPONDENT: Yes. That'll take too long for me to pee.

OFFICER: It'll take too long for you to pee?

RESPONDENT: No-no-no, I can try real quick but otherwise, what are you guys gonna take me somewhere for the blood test?

OFFICER: Yes.

RESPONDENT: Yeah, let's just do the blood test.

Respondent was transported to a hospital, where his blood was drawn without a warrant; testing revealed the presence of the controlled substances THC and Alprazolam.

The state charged respondent with misdemeanor driving while impaired, driving while under the influence of a controlled substance, in violation of Minn.Stat. § 169A.20, subd. 1(2) (2010). Respondent initially moved to suppress evidence resulting from the search, arguing that the implied-consent advisory as read was misleading, that the burden of proof was improperly shifted to him to prove that he used Alprazolam according to its prescribed use, and that the DRE and an officer's testimony were obtained in

violation of his *Miranda* rights. After an evidentiary hearing, the district court issued an order denying the motion to suppress.

After the United States Supreme Court issued its decision in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), respondent renewed his motion to suppress evidence based on that holding. *See id.* at 1563 (holding that the dissipation of alcohol in a defendant's blood did not, by itself, establish exigent circumstances sufficient to excuse police from obtaining a search warrant required under the Fourth Amendment). Respondent argued that, because his consent to testing was not voluntary, and no other warrant exception applied, he was compelled to submit to testing in violation of his Fourth Amendment rights.

The district court considered written arguments and granted the motion to suppress. The district court applied the totality-of-the-circumstances test articulated in *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2048 (1973), and concluded that the state failed to meet its burden to establish that respondent freely and voluntarily consented to the search. The district court noted that when respondent was first asked whether he understood the circumstances of his arrest, he stated that he did not; and that although his right to counsel may have been vindicated, the threat of serious criminal prosecution that accompanies refusal weighed against the voluntariness of the search.

The state challenged the order in this court, which stayed the appeal pending release of the Minnesota Supreme Court's decision in *State v. Brooks*, 838 N.W.2d 563 (Minn.2013), *cert. denied*, 124 S.Ct. 1799 (2014). Following *Brooks*, we reinstated this appeal and permitted the parties to submit supplemental briefing.

DECISION

The state may appeal a pretrial order in a criminal case if the district court's alleged error, unless reversed, will have a critical impact on the outcome of trial. Minn. R.Crim. P. 28.04, subds. 1(1), 2(1)."[T]he standard for critical impact is that the lack of the suppressed evidence significantly reduces the likelihood of a successful prosecution."*State v. Edrozo*, 578 N.W.2d 719, 723 (Minn.1998) (quotation omitted). Dismissal of a charge following the suppression of evidence meets the critical-impact standard.*State v. Holmes*, 569 N.W.2d 181, 184 (Minn.1997). Because the district court dismissed the DWI charge after suppressing the evidence, the state has met the critical-impact test.

"When reviewing pretrial orders on motions to suppress evidence, [appellate courts] may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing – or not suppressing – the evidence."*State v. Harris*, 590 N.W.2d 90, 98 (Minn.1999). The state's challenge to the district

court's suppression order presents a question of law, and we examine the facts and review de novo whether the district court erred by suppressing the evidence. *Id.*

Both the United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Warrantless searches are unreasonable, unless an exception applies. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn.2007). The state has the burden to establish the existence of an exception to the warrant requirement. *State v. Ture*, 632 N.W .2d 621, 627 (Minn.2001). One exception to the warrant requirement is voluntary consent. *Schneckloth*, 412 U.S. at 219, 93 S.Ct. at 2043-44; *State v. Diede*, 795 N.W.2d 836, 846 (Minn.2011).

"Taking blood and urine samples from someone constitutes a 'search' under the Fourth Amendment."*Brooks*, 838 N.W.2d at 568. In *Brooks*, the Minnesota Supreme Court held that a totality-of-the-circumstances test applies in assessing whether a defendant voluntarily consented to chemical testing. *Id.* Whether consent was voluntary is a question of fact, and a totality-of-the-circumstances analysis requires evaluation of "the nature of the encounter, the kind of person the defendant is, and what was said and how it was said."*State v. Dezso*, 512 N.W.2d 877, 880 (Minn.1994). The nature of the encounter includes how the police came to suspect the driver was under the influence, whether police read the driver the implied-consent advisory, and whether he

had the right to consult with an attorney. *Brooks*, 838 N.W.2d at 569. But a driver's consent is not coerced as a matter of law simply because he or she is advised of criminal consequences for test refusal. *Id.* at 570.

Here, although *Brooks* had not yet been issued, the district court appropriately analyzed the issue of respondent's consent under the totality-of-the-circumstances standard later enunciated in *Brooks*.*See Schneckloth*, 412 U.S. at 227, 93 S.Ct. at 2048. We disagree, however, with the district court's determination that, based on that standard, respondent did not voluntarily consent to testing.

In *Brooks*, the supreme court held that the defendant consented to a warrantless search of his blood and urine, based on circumstances that he was properly read the implied-consent advisory, had access to a telephone and spoke to an attorney, and agreed to testing. *Brooks*, 838 N.W.2d at 570-72. Similarly, we conclude that in this case, the totality of the circumstances – "the nature of the encounter, the kind of person [respondent] is, and what was said and how it was said" – supports a determination, as a matter of law, that respondent voluntarily consented to testing. *Deszo*, 512 N.W.2d at 880. Respondent was seized at the scene of an accident when he displayed signs of obvious impairment. The arresting officer read him the implied-consent advisory as set out by statute. *See*Minn.Stat. § 169A.51, subd. 2 (2010) (listing requirements of implied-consent advisory); *see also Hallock v. Comm'r of Pub. Safety*, 372 N.W.2d 82, 83 (Minn.App.1985) (stating that "[u]niformity in

giving the implied consent advisory is highly encouraged"). Although respondent initially expressed that he did not understand his arrest for DWI, after hearing the advisory and being provided with an opportunity to contact an attorney, he declined a urine test but unequivocally agreed to take a blood test.

Respondent argues that, unlike the defendant in *Brooks*, he was not able to consult with an attorney before deciding whether to submit to testing. In *Brooks*, the supreme court noted that the defendant's "consult[ation] with counsel before agreeing to [testing] reinforces the conclusion that his consent was not illegally coerced."*Brooks*, 838 N.W.2d at 571. But a defendant's consultation with an attorney is only one factor in the analysis of whether consent was voluntary. *See id.*Here, respondent has not argued that his right to counsel was not vindicated. The record shows that the officer provided ample opportunity for him to contact an attorney, and when he finished using the phone, asked whether he wished to proceed or to try again to reach an attorney. Although declining a urine test, respondent replied unequivocally that he would take a blood test. We conclude that the totality of the circumstances shows, as a matter of law, that respondent voluntarily consented to the search, and the district court erred by suppressing the evidence.

Reversed and remanded.

Supreme Court, U.S.
MOTION FILED

FEB - 8 2016

No. 14-1468

In The

Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of North Dakota

MOTION OF INDIANA TECH LAW SCHOOL AMICUS PROJECT FOR LEAVE TO FILE AN AMICUS BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF NEITHER PARTY

ADAM LAMPARELLO
Counsel of Record
INDIANA TECH LAW SCHOOL
Amicus Project
1600 East Washington Blvd.
Fort Wayne, IN 46803
260.422.5561, ext. 3450
AXLamparello@indianatech.edu

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

MOTION TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(b), Indiana Tech Law School Amicus Project respectfully moves to file the attached brief in support of neither party. Counsel for Petitioner has not responded to the Amicus Project's request for consent to file this brief. Respondent has consented by email.

Counsel for the Amicus Project is an Assistant Professor of Law at Indiana Tech Law School in Fort Wayne, Indiana. Counsel practices, teaches, and publishes in the areas of criminal and constitutional law. Counsel's publications address, among other things, the scope of privacy rights under the Fourth Amendment, particularly in circumstances where law enforcement officers perform warrantless searches.

As discussed in the attached brief, the Amicus Project believes that this case presents the Court with an opportunity to clarify the law regarding the permissibility of criminalizing warrantless blood draws. The Amicus Project respectfully submits that states may not criminalize a motorist's refusal to consent to a warrantless blood test where, as here, the statute upon which criminalization is based violates the Fourth Amendment, where alternative and less intrusive methods are available to establish probable cause that a motorist is driving while intoxicated, and where there is no risk that a motorist's blood-alcohol level will dissipate during the time in which a warrant is procured.

Thus, the Amicus Project submits that the Court should adopt a rule holding that states may not criminalize a motorist's refusal to consent to a warrantless blood test *unless* law enforcement officers are faced with exigent circumstances, such as where a motorist also refuses to consent to a breathalyzer or urine test, or where delays in obtaining a warrant will likely result in dissipation of a motorist's blood alcohol level. Such a rule will appropriately balance law enforcement's interest in deterring drunk driving while protecting motorists from unnecessary – and unreasonable – searches.

Accordingly, the Amicus Project respectfully requests that the Court grant the Amicus Project's motion for leave to file the attached brief as amicus curiae.

Respectfully submitted,

ADAM LAMPARELLO
Counsel of Record
INDIANA TECH LAW SCHOOL
Amicus Project
1600 East Washington Blvd.
Fort Wayne, IN 46803
260.422.5561, ext. 3450
AXLamparello@indianatech.edu

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 8

I. N.D.C.C. §39-08-01 Violates The Fourth Amendment Because The Statutory Provision Upon Which Violations Are Based – N.D.C.C. §39-20-01 – Is At Least Partially Unconstitutional 8

II. Under N.D.C.C. §39-08-01, The Criminalization Of A Motorist's Refusal To Consent To Warrantless Blood Test Exceeds The Scope Of The Implied Consent Doctrine 13

III. A Case-By-Case Approach To Warrantless Blood Testing Will Provide Guidance To Law Enforcement Officers, Further The Interest In Deterring Drunk Driving, And Preserve Privacy Protections 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Gant, 556 U.S. 332 (2009).....5, 9, 14

Brigham City v. Stuart, 547 U.S. 398 (2006).....8

Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011).....20

California v. Carney, 471 U.S. 386 (1985).....18

Chimel v. California, 395 U.S. 752 (1969).....4, 5, 14

Cupp v. Murphy, 412 U.S. 291 (1973).....10

Delaware v. Prouse, 440 U.S. 648 (1979).....8

Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).....9

Hammer v. Gross, 932 F.2d 842 (9th Cir. 1991)....16, 17

Kentucky v. King, 131 S. Ct. 1849 (2011).....16

Ker v. California, 374 U.S. 23 (1963).....10

Marshall v. Columbia Lea Regional Hosp., 345 F.3d 1157 (10th Cir. 2003).....9

Maryland v. King, 133 S. Ct. 1958 (2013) 6

McDonald v. United States, 335 U.S. 451 (1948).....9

Michigan v. Fisher, 558 U.S. 45 (2009).....10

Michigan v. Tyler, 436 U.S. 499 (1978).....10

Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990).....19

Missouri v. McNeely, 133 S. Ct. 1552 (2013) .....*passim*

TABLE OF AUTHORITIES – Continued

Page

Nelson v. City of Irvine, 143 F.3d 1196 (9th Cir. 1998) 3, 16

New York v. Belton, 453 U.S. 454 (1981) 5, 14

Richards v. Wisconsin, 520 U.S. 385 (1997) 3, 9

Riley v. California, 134 S. Ct. 2473 (2014) ..... *passim*

Samson v. California, 547 U.S. 843 (2006) 8

Skinner v. Railway Lab. Execs. Ass'n, 489 U.S. 602 (1989) 8, 16

State v. Rodriguez, 2007 UT 15, 156 P.3d 771 (Utah 2007) 20

United States v. Jones, 132 S. Ct. 945 (2012) 6

United States v. Knights, 534 U.S. 112 (2006) 8

United States v. Montoya de Hernandez, 473 U.S. 531 (1985) 8

United States v. Santana, 427 U.S. 38 (1976) 10

Winston v. Lee, 470 U.S. 753 (1985) 18

STATUTES

N.D.C.C. §39-08-01 ..... *passim*

N.D.C.C. §39-20-01 ..... *passim*

SECONDARY SOURCES

NHTSA *Use of Warrants for Breath Test Refusal: Case Studies* 36 (No. 810852, Oct. 2007) 20

INTEREST OF AMICUS CURIAE

Amicus Curiae Indiana Tech Law School Amicus Project ("Amicus Project") strives to assist the Court in reaching decisions that guide law enforcement officers regarding the appropriate penalties that may be imposed for a motorist's refusal to submit to a warrantless breath, urine, or blood test. Counsel for the Amicus Project has substantial expertise in Fourth Amendment jurisprudence and has previously filed amicus briefs in *City of Los Angeles v. Patel*, 135 S. Ct. 400 (2014), *Riley v. California*, 134 S. Ct. 2473 (2014), and *Heien v. North Carolina*, 135 S. Ct. 530 (2014).[1]

Counsel has also written a number of scholarly articles in this area, including *Abidor v. Napolitano: Suspicionless Cell Phone and Laptop "Strip" Searches at the Border Compromise the Fourth and First Amendments*, 20 Northwestern L. Rev. *COLLOQUY* 280 (2014) (with Charles E. MacLean), *Back to the Future: Returning to Reasonableness and Particularity*

---

[1] Counsel for Petitioner has not responded to the Amicus Project's request for consent to file this brief. Respondent has consented by email. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, its law school, or its counsel made a monetary contribution to this brief's preparation or submission. The views expressed herein are solely those of the Indiana Tech Law School Amicus Project and do not necessarily represent the view of Indiana Tech Law School or the Indiana Institute of Technology.

Under the Fourth Amendment, 99 IOWA L. REV. Bulletin 101 (2014) (with Charles E. MacLean), and *Riley v. California: The New Katz or Chimel?* 20 Richmond J. L. & Tech. (2014) (with Charles E. MacLean).

SUMMARY OF ARGUMENT

> "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013)

N.D.C.C. §39-08-01, which criminalizes a motorist's refusal to consent to a warrantless blood test regardless of the circumstances, cannot withstand constitutional scrutiny.[2]

First, in violation of *McNeely*, the statute upon which criminalization is predicated – N.D.C.C. §39-20-01 – at least partially violates the Fourth

[2] The Amicus Project's argument is limited to the constitutionality of criminalizing a warrantless *blood* test, not breathalyzer or urine tests. A breathalyzer and, to a slightly lesser extent, urine test may be necessary in some cases to enable law enforcement to establish probable cause and obtain a warrant. Thus, criminalizing a suspect's refusal to submit to these tests may incentivize motorists to consent to such tests and therefore further the interests in deterring drunk driving and protecting public safety.

Amendment. Specifically, N.D.C.C. §39-20-01 creates a *per se* exigency exception to the warrant requirement, thus permitting warrantless blood draws of every motorist, regardless of whether exigent circumstances are present and justify dispensing with the warrant requirement. *See McNeely*, 133 S. Ct. at 1561 (although "some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test," that fact "is a reason to decide each case on its facts . . . not to accept the 'considerable overgeneralization' that a *per se* rule would reflect") (*quoting Richards v. Wisconsin*, 520 U.S. 385, 393 (1997)). On this basis alone, the provision of N.D.C.C. §39-20-01 authorizing warrantless blood tests of every motorist, and the criminalization of a motorist's refusal to consent to such test, violates the Fourth Amendment.

Second, law enforcement officers have less intrusive means available at their disposal to obtain the same evidence and thus establish probable cause that a motorist is driving while intoxicated. *See, e.g.*, *Nelson v. City of Irvine*, 143 F.3d 1196, 1202 (9th Cir. 1998) ("breath and urine tests are equally effective as a blood test in determining whether a motorist has violated the DUI law"). Accordingly, permitting states to perform warrantless blood tests in every case, even where a motorist consented to a breathalyzer or urine test, thereby permitting a warrant to be readily obtained without risking dissipation of a motorist's blood-alcohol level, would allow states to evade

McNeely's case-by-case framework and unjustifiably infringe on privacy rights. Similarly, such a result is clearly untenable in those cases where the search at issue is ultimately deemed unreasonable, thus rendering the refusal lawful. This, in a nutshell, is the problem.[3]

Third, and as discussed in detail *infra*, criminalizing a motorist's refusal to consent to a warrantless blood test in every situation, particularly where the motorist has consented to breathalyzer and urine tests, represents an unnecessary and unprincipled expansion of the implied consent doctrine in the same way that warrantless cell phone searches impermissibly exceeded the scope of the search incident to arrest doctrine. *See Riley v. California*, 134 S. Ct. 2473, 2495 (2014); *Chimel v. California*, 395 U.S. 752, 762-763 (1969) (holding that warrantless searches incident to arrest were permissible to protect officers' safety and prevent evidence from being destroyed). Indeed, the reasoning in *Riley* provides the Court with a workable framework in which to analyze the constitutionality of N.D.C.C.

---

[3] Of course, this is not to say that exigent circumstances can *never* exist to justify a warrantless blood search. It is to say, however, that exigencies should be evaluated on a case-by-case basis under the totality of the circumstances. *See Riley*, 134 S. Ct. at 2494 ("the exigent circumstances exception *requires* a court to examine whether an emergency justified a warrantless search in each particular case"). That is precisely the point – and the Court should rule similarly here.

§39-08-01's criminalization of a motorist's refusal to consent to a warrantless blood test.

By way of background, in *Riley* the Court unanimously held that, absent exigent circumstances, warrantless searches of cell phones incident to arrest are unreasonable and therefore violate the Fourth Amendment. 134 S. Ct. at 2495. The outcome in *Riley* can be traced to the Court's post-*Chimel* jurisprudence, in which the Court expanded the search incident to arrest doctrine to include searches that did not implicate officer safety or evidence preservation.

For example, in *New York v. Belton*, the Court relied in part on *Chimel* to hold that law enforcement officers could search a passenger compartment incident to arrest even though the motorist was in police custody and there was no risk that evidence would be destroyed. 453 U.S. 454, 462-463 (1981). In *Arizona v. Gant*, the Court expanded the search incident to arrest doctrine to permit searches of areas in a vehicle that officers reasonably believed contained evidence related to the crime of arrest. 556 U.S. 332, 343 (2009). The Court's holdings in *Belton* and *Gant* demonstrated that the bright-line rule adopted in *Chimel* had been expanded to such a degree that the original justifications for the search incident to arrest doctrine were little more than an afterthought.

The Court ended this charade in *Riley*, holding that warrantless cell phone searches did not implicate the original justifications underlying the search incident to arrest doctrine and therefore violated the

Fourth Amendment. Specifically, in *Riley*, the Court curtailed a decades-old and unprincipled expansion of the search incident to arrest doctrine, in which searches of passenger compartments, plastic containers, and other objects were upheld even though there was no threat to officer safety and no risk that evidence would be destroyed. In so doing, the Court held that, absent exigent circumstances, law enforcement officers could not search a cell phone without a warrant. *See Riley*, 134 S. Ct. at 2495.

Significantly, the Court reached this result even though arrestees, like citizens operating motor vehicles on public roads, enjoy a *reduced* expectation of privacy. *See id.* at 2588 ("[T]he fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely. Not every search 'is acceptable solely because a person is in custody.'") (*quoting Maryland v. King*, 133 S. Ct. 1958, 1979 (2013)); *accord United States v. Jones*, 132 S. Ct. 945 (2012) (holding that the use of a GPS tracking device to monitor a motorist's movements for twenty-eight days violated the Fourth Amendment).

The Court's reasoning in *Riley* provides a sound analytical framework in which to hold that law enforcement may not perform warrantless blood tests, and states cannot criminalize a motorist's refusal to submit to such a test, *unless* officers are faced with *truly* exigent circumstances. In cases where motorists consent to breathalyzer or urine tests or law enforcement has ample time to obtain a warrant without

risking dissipation of a motorist's blood-alcohol level, the need to perform a *warrantless* blood test is not necessary to establish probable cause that a motorist is driving while intoxicated. Thus, criminalizing a suspect's refusal in this context is neither reasonable nor necessary to further the interests underlying the implied consent doctrine: deterring drunk driving and protecting public safety.

Put differently, criminalizing the refusal to submit to a warrantless blood test should only be permitted where a motorist refuses to consent to a breathalyzer or urine test, thus rendering it necessary, at least in some cases, to perform warrantless blood tests to establish probable cause of a DWI violation, *or* to avoid dissipation in a motorist's blood-alcohol level where officers are faced with lengthy delays in procuring a warrant.

In these limited circumstances, permitting states to criminalize the refusal to consent to a warrantless blood test would further the interest in deterring drunk driving and protecting public safety, and strike the proper balance between the investigatory needs of law enforcement and a motorist's privacy rights. In the absence of exigent circumstances, the message to states that seek to force motorists, under threat of criminal prosecution, to undergo warrantless blood tests should be simple – get a warrant.

For the foregoing reasons, the North Dakota Supreme Court's decision should be reversed.

ARGUMENT

I. N.D.C.C. §39-08-01 Violates The Fourth Amendment Because The Statutory Provision Upon Which Violations Are Based – N.D.C.C. §39-20-01 – Is At Least Partially Unconstitutional.

Reasonableness is the touchstone of Fourth Amendment analysis. *See Riley*, 134 S. Ct. at 2482 ("[A]s the text makes clear, 'the ultimate touchstone of the Fourth Amendment is reasonableness.'") (*quoting Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). Whether a search is unreasonable "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself," and entails "'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Skinner v. Railway Lab. Execs. Ass'n*, 489 U.S. 602, 619 (1989) (*quoting United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *Delaware v. Prouse*, 440 U.S. 648, 656 (1979)); *see also Samson v. California*, 547 U.S. 843, 848 (2006) (relying on the totality of the circumstances "to determine whether a search is reasonable within the meaning of the Fourth Amendment") (*quoting United States v. Knights*, 534 U.S. 112, 118 (2006)) (internal quotation marks omitted).[4]

---

[4] Against this backdrop, at least one court has held that "a warrantless blood test, performed without consent, is *presumptively* unreasonable unless the state actors involved had probable

(Continued on following page)

Thus, given "the fact-specific nature of the reasonableness inquiry," the Court "evaluate[s] each case of alleged exigency based on its own facts and circumstances." *McNeely*, 133 S. Ct. at 1559 (*quoting Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931)), *abrogated by Arizona v. Gant*, 556 U.S. 332 (2009). As the Court noted in *McNeely*, "[n]umerous police actions are judged based on fact-intensive, totality of the circumstances analyses rather than according to categorical rules, including in situations that are more likely to require police officers to make difficult split-second judgments." 134 S. Ct. at 1564.

For these reasons, the Court has refused to adopt a *per se* exception to the warrant requirement. *See, e.g.*, *Richards*, 520 U.S. 385, 391-396 (1997) (rejecting a *per se* exception to the knock-and-announce requirement for felony drug investigations based on presumed exigency, and requiring instead evaluation of police conduct "in a particular case"); *McDonald v. United States*, 335 U.S. 451, 456 (1948) (holding that "[w]e cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the search] imperative").

In *McNeely*, a four-member plurality of the Court specifically rejected the state's attempt to create a *per*

---

cause and exigent circumstances sufficient to justify it." *Marshall v. Columbia Lea Regional Hosp.*, 345 F.3d 1157, 1172 (10th Cir. 2003) (emphasis added).

se exception for warrantless blood tests. *See McNeely*, 133 S. Ct. at 1564 ("[W]hile the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake.").[5] Writing for the plurality, Justice Sotomayor held that the dissipation of a motorist's blood-alcohol level – the most common reason given to justify warrantless blood tests – does not support such an exception.[6] *See id.* at 1568 ("[T]he natural dissipation of alcohol in the bloodstream does not constitute an exigency in *every case* sufficient to

---

[5] The *McNeely* plurality also explained that "adopting the State's *per se* approach . . . might well diminish the incentive for jurisdictions 'to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement.'" *McNeely*, 133 S. Ct. at 1563 (internal citation omitted).

[6] In *McNeely*, the plurality identified various circumstances where an exigency renders it impractical to obtain a warrant, all of which depend on a careful, face-sensitive, case-by-case analysis. *See, e.g.*, *Michigan v. Fisher*, 558 U.S. 45, 47-48 (2009) (per curiam); *United States v. Santana*, 427 U.S. 38, 42-43 (1976) (engaging in "hot pursuit" of a fleeing motorist); *Michigan v. Tyler*, 436 U.S. 499, 509-510 (1978) (entering a burning building to put out a fire and investigate its cause). Exigencies are also based on the need to prevent the imminent destruction of evidence *See, e.g.*, *Cupp v. Murphy*, 412 U.S. 291, 296 (1973); *Ker v. California*, 374 U.S. 23, 40-41 (1963) (plurality opinion). As the Court held in *McNeely*, those circumstances are not present where law enforcement takes a warrantless and nonconsensual blood test of a motorist suspected of driving while intoxicated.

justify conducting a blood test without a warrant.") (emphasis added). In so holding, Justice Sotomayor noted that, although "dissipation of alcohol in the blood may support a finding of exigency in a specific case," the question of whether a warrantless blood test of a drunk-driving motorist is reasonable "must be determined case by case based on the totality of the circumstances." *Id.* at 1563.

This approach implicitly recognizes that warrantless blood tests are not always necessary. For example, in situations where "the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the motorist is being transported to a medical facility by another officer," there could be no "plausible justification for an exception to the warrant requirement." *Id.* at 1561. As such, "[w]hile the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake." *Id.* at 1564.[7]

---

[7] This approach is consistent with the practices of many states, which "lift restrictions on nonconsensual blood testing if law enforcement officers first obtain a search warrant or similar court order." *Id.* at 1566. In addition, "a majority of States either place significant restrictions on when police officers may obtain a blood sample despite a motorist's refusal (often limiting testing to cases involving an accident resulting in death or serious

(Continued on following page)

Applying this framework, the provision of N.D.C.C. §39-20-01 authorizing warrantless blood tests in every case violates the Fourth Amendment. N.D.C.C. §39-20-01 impermissibly establishes a *per se* exception to the warrant requirement and thereby forecloses a case-by-case evaluation of whether a warrantless blood test was reasonable under the circumstances.

Importantly, however, invalidating the portion of N.D.C.C. §39-20-01 that authorizes warrantless blood tests in every case does not end the constitutional inquiry. It remains unsettled whether the *criminalization* of a motorist's refusal to consent to a warrantless blood test is *always* unconstitutional, particularly where exigent circumstances, such as a motorist's refusal to consent to breathalyzer or urine tests, justify dispensing with the warrant requirement, or where lengthy delays in obtaining a warrant makes it likely that a motorist's blood-alcohol level will dissipate.

In fact, in *McNeely* the Court cited with approval laws that authorized *civil* penalties and inferences of guilt for refusing to consent to blood-alcohol tests, but did not address the constitutionality of criminalizing a motorist's refusal. *See McNeely*, 133 S. Ct. at 1566 (noting that "[s]uch laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended

---

bodily injury) or prohibit nonconsensual blood tests altogether"). *Id.*

or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution").

As discussed below, the Court's decision in *Riley* provides a workable framework to resolve this question, and to effectively balance the interest in protecting public safety with the privacy rights of motorists.

II. Under N.D.C.C. §39-08-01, The Criminalization Of A Motorist's Refusal To Consent To Warrantless Blood Test Exceeds The Scope Of The Implied Consent Doctrine.

The interests in deterring drunk driving and protecting public safety support the proposition that motorists implicitly consent to *some* searches aimed at determining blood-alcohol content. However, States should not be permitted to criminalize a motorist's refusal to consent to a warrantless blood test particularly where the underlying statutory provision – §39-20-01 – prohibits *any* court from evaluating whether such test, in a given case, violates the Fourth Amendment.

The parallels between *Riley* and *Birchfield* are striking and the analysis articulated by the *Riley* Court offers an elegant model for both conducting the necessary balancing of privacy rights and public safety, while also providing clear guidance to law enforcement in handling DWI investigations. Specifically, just as the *Riley* Court held that the search incident to arrest doctrine did not permit law enforcement to conduct warrantless searches irrespective

of threats to officer safety or the need to preserve evidence, here the Court should hold that the implied consent doctrine should not be construed to mean that officers can *criminalize* the refusal to submit to a warrantless blood test in every case, irrespective of whether it is necessary or reasonable to perform such tests.

In *Riley*, the Court implicitly recognized that its search incident to arrest jurisprudence had been expanded to unprecedented proportions and rendered the original justifications underlying searches incident to arrest little more than an afterthought. *See Belton*, 453 U.S. 454 (upholding the search of a passenger compartment even though the motorist was already in custody); *Gant*, 556 U.S. 332 (expanding the search incident to arrest doctrine to include areas that might reasonably contain evidence related to the crime of arrest). The Court recognized that permitting law enforcement officers to perform warrantless searches of cell phones would have represented an unprecedented expansion of *Chimel* while having no relationship whatsoever to furthering the interest in protecting officers' safety and preserving evidence.[8]

---

[8] In *Riley*, the Court also emphasized that warrantless cell phone searches constituted a more severe infringement on privacy interests than searches of finite objects such as passenger compartments and plastic containers. *See Riley*, 134 S. Ct. at 2490. Justice Roberts stated as follows:

> [T]here is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of

(Continued on following page)

Although implied consent laws were not at issue in *Riley*, the Court's reasoning, as well as the rule adopted, should be applied here. N.D.C.C. §39-08-01 criminalizes a motorist's refusal to consent to a warrantless blood search even though law enforcement have at their disposal breathalyzer and urine tests, which can accurately calculate a motorist's blood-alcohol level, to establish probable cause that a suspect is driving while intoxicated. In such circumstances, there is little, if any, need to force *every* motorist to a *warrantless* blood test, particularly where the motorist has consented to a breathalyzer or urine test, thus eliminating the risk that a motorist's blood-alcohol level will dissipate during the time in which law enforcement officers obtain a warrant.

As such, criminalizing the refusal to submit to a warrantless blood test, without even evaluating whether law enforcement officers were faced with exigent circumstances, such as a motorist's refusal to consent to a breathalyzer or urine test or a lengthy delay in obtaining a warrant, is patently unreasonable. *See, e.g.*, *Nelson*, 143 F.3d at 1201 ("[W]hen a DUI arrestee consents to undergo a breath or urine test, the government has available to it an effective alternative to

---

sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception. According to one poll, nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower. *Id.*

a blood test as a means of obtaining the same evidence.").[9] As the Ninth Circuit held in *Nelson*, "[c]onsent to a breathalyzer test may very well have reduced to insignificance the defendants' need to extract [plaintiff's] blood." *Id.* (*quoting Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir. 1991)). Put simply, absent a compelling *need* to administer a warrantless blood test (e.g., to establish probable cause or prevent dissipation of a motorist's blood-alcohol level) criminalizing the refusal to submit to a warrantless blood test has little to do with protecting public safety, and everything to do with attempting to evade *McNeely*'s holding and avoid a case-by-case evaluation of whether such searches are reasonable under the Fourth Amendment. *See, e.g.*, *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (exigent circumstances are present "when the exigencies of the situation make the needs of law enforcement so compelling" that a warrantless search is necessary).

---

[9] In *Skinner*, the Court recognized that blood tests implicate Fourth Amendment privacy protections:

> Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment. Further, breath tests reveal the level of alcohol in the employee's bloodstream and nothing more . . . *[B]reath tests reveal no other facts in which the employee has a substantial privacy interest*. 489 U.S. at 625 (emphasis added).

Yet, the plain language of N.D.C.C. §39-20-01 leads to precisely that result, and that is precisely why it fails to withstand constitutional scrutiny.

To be sure, "[n]o matter how serious the offense, the availability of an equally effective, consensual method of obtaining the evidence conclusively renders use of the nonconsensual method *unreasonable*." *Hammer*, 932 F.2d at 852 (Kozinski, J., concurring) (emphasis added) (also noting that, "[i]f the motorist requests a breath or urine test and it will do the job just as well, it must be used in lieu of a blood test-even where the suspected crime is murder in the first degree").

In *McNeely*, the four-member plurality relied in part on the availability of less intrusive searches when rejecting a *per se* exigency exception for warrantless blood tests. *See McNeely*, 133 S. Ct. at 1566 (holding that "[s]tates have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws"). For example, the *McNeely* Court pointed out that "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Id.*

The parallels with *Riley* do not stop there. Just as arrestees retain significant privacy interests in the contents of a cell phone despite having a *reduced* expectation of privacy on public roadways, motorists also retain a substantial privacy interest in their bodily integrity, particularly where alternative search

methods are available to ensure that law enforcement's interest in deterring drunk driving is not hindered. As the Court held in *McNeely*, "the fact that people are 'accorded less privacy in . . . automobiles because of th[e] compelling governmental need for regulation . . . does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin.'" 133 S. Ct. at 1565 (*quoting California v. Carney*, 471 U.S. 386, 392 (1985)); *see also Winston v. Lee*, 470 U.S. 753, 760 (1985) (holding that "invasions of bodily integrity implicate an individual's 'most personal and deeply-rooted expectations of privacy'").

Accordingly, criminalizing a refusal to consent represents an unprecedented expansion of the implicit consent doctrine in the same way that searches of passenger compartments and plastic containers represented an unprecedented expansion of the search incident to arrest doctrine. The original justifications underlying the implied consent doctrine – deterring drunk driving and protecting public safety – do not support a wholesale exception for warrantless blood tests and certainly not the criminalization of a refusal to consent to such tests in every or even any situation.

As a result, the Court should prohibit states from criminalizing warrantless blood tests *unless* a motorist refuses to consent to a breathalyzer or urine test, thus making it difficult to establish probable cause, *or* where *truly* exigent circumstances exist that render it *necessary* to perform a test without a warrant. The

only way to determine whether this standard is satisfied and criminalization proper is by assessing such searches on a case-by-case basis.

III. A Case-By-Case Approach To Warrantless Blood Testing Will Provide Guidance To Law Enforcement Officers, Further The Interest In Deterring Drunk Driving, And Preserve Privacy Protections.

Evaluating the reasonableness of warrantless blood tests on a case-by-case basis will appropriately balance the need of law enforcement to protect the public with a motorist's privacy interests. *See McNeely*, 133 S. Ct. at 1555 ("[W]hile some progress has been made, drunk driving continues to exact a terrible toll on our society."); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990) ("[N]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."). Officers will have ample tools available at their disposal (e.g., field, breathalyzer, and urine tests) to investigate whether a motorist is operating a vehicle while intoxicated, motorists will be protected from unreasonable and unnecessary searches, and warrantless blood tests will be permitted where a *true* exigency exists.

As the *McNeely* plurality explained, "[w]e are aware of no evidence indicating that restrictions on nonconsensual blood testing have compromised drunk-driving enforcement efforts in the States that

have them." 133 S. Ct. at 1567. In fact, "field studies in States that permit nonconsensual blood testing pursuant to a warrant have suggested that, although warrants do impose administrative burdens, their use can reduce breath-test-refusal rates and improve law enforcement's ability to recover BAC evidence" (*citing Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710-2711 (2011)) (noting that the blood test was obtained pursuant to a warrant after the petitioner refused a breath test); NHTSA *Use of Warrants for Breath Test Refusal: Case Studies* 36-38 (No. 810852, Oct. 2007).

In addition, technological advances substantially increase the likelihood that officers will have sufficient time to procure a warrant before blood-alcohol level begins to dissipate. As the Court noted in *McNeely*, "a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing." 133 S. Ct. at 1562. In addition, "jurisdictions have found other ways to streamline the warrant process, such as by using standard-form warrant applications for drunk-driving investigations." *Id.* Thus, adopting a *per se* exigency exception would disregard "the current and future technological developments in warrant procedures." *Id.* at 1563 (*quoting State v. Rodriguez*, 2007 UT 15, ¶ 46, 156 P.3d 771, 779 (Utah 2007)).

This framework will also incentivize law enforcement to carefully consider whether the circumstances justify dispensing with the warrant

requirement, rather than give law enforcement freewheeling authority to take a motorist's blood at any time – and for whatever reason.

Ultimately, if N.D.C.C. §§39-20-01 and 39-08-01 are upheld, the Court will send a message that states can circumvent the Fourth Amendment with legislation that admittedly achieves worthy policy objectives, yet does so at the expense of core constitutional protections. In *Riley*, the Court's decision recognized this fact, and implicit in its holding was the admonition that the objective of serving the public good, such as by deterring drunk driving, must not be achieved through laws that make the public less free and the Constitution less relevant.

CONCLUSION

For the foregoing reasons, the judgment of the North Dakota Supreme Court should be reversed.

Respectfully submitted,

ADAM LAMPARELLO
Counsel of Record
INDIANA TECH LAW SCHOOL
Amicus Project
1600 East Washington Blvd.
Fort Wayne, IN 46803
260.422.5561, ext. 3450
AXLamparello@indianatech.edu

Nos. 14-1468, 14-1470, 14-1507

In the Supreme Court of the United States

DANNY BIRCHFIELD,
Petitioner,

v

NORTH DAKOTA,
Respondent.

WILLIAM ROBERT BERNARD, JR.,
Petitioner,

v.

MINNESOTA,
Respondent.

STEVE MICHAEL BEYLUND,
Petitioner,

v.

GRANT LEVI, DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,
Respondent.

On Writs of Certiorari to the Supreme Courts of Minnesota and North Dakota

---

AMICUS CURIAE BRIEF OF MOTHERS AGAINST DRUNK DRIVING SUPPORTING THE RESPONDENT STATES

Adam W. Vanek
MOTHERS AGAINST DRUNK DRIVING
511 E. John Carpenter Freeway
Suite 700
Irving, TX 75062
(469) 420-4517
adam.vanek@MADD.org

David Venderbush
Counsel of Record
Kirk T. Bradley
Brianna Kadjo
ALSTON & BIRD LLP
90 Park Avenue
New York, NY 10016
(212) 210-9400
dvenderbush@alston.com

Attorneys for Amicus Curiae

Becker Gallagher Cincinnati, OH Washington, D.C 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. STATES HAVE A COMPELLING INTEREST IN DRUNK DRIVING ENFORCEMENT 5

A. The Court And The Parties Accepted The Compelling State Interest 5

B. Drunk Driving Is Still A "Pressing Problem." 6

C. Criminal Refusal Statutes Are Effective In Reducing Refusals And Increasing Convictions 8

II. MODEST CRIMINAL PENALTIES FOR TEST REFUSAL PERMISSIBLY FALL WITHIN THE BROAD RANGE OF LEGAL TOOLS ALREADY APPROVED BY THE COURT 9

A. States May Place "Significant Consequences" On a Motorist's Withdrawal of Implied Consent 12

1. The Court Has Historically Supported Law Enforcement Efforts To Combat Drunk Driving, Including The Use Of BAC Tests 12

2. The Court Has Approved Implied Consent Laws 14

B. No Constitutional Rule Categorically Precludes Criminal Penalties Regarding Consent To Fourth Amendment Searches 16

C. In The Interest Of Federalism, States Generally Have Wide Latitude To Pursue Compelling Interests And To Impose Penalties 20

III. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE DOES NOT INVALIDATE THE TEST REFUSAL STATUTES AT ISSUE 22

A. Test Refusal Does Not Implicate a Constitutional Right Under The Fourth Amendment 24

B. Even If There Were a Constitutional Right to Refuse Testing, The Condition Imposed Is Closely Related to the Government's Valid Objectives 26

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Atkins v. Virginia,
536 U.S. 304 (2002) 20

Beylund v. Levi,
859 N.W.2d 403 (N.D. 2015) 22

Breithaupt v. Abram,
352 U.S. 432 (1957) ..... *passim*

Camara v. Mun. Ct. of San Francisco,
387 U.S. 523 (1967) 11, 18

City of Los Angeles, Calif. v. Patel,
135 S. Ct. 2443 (2015) 11, 18

Dist. Attorney's Office for Third Judicial Dist. v. Osborne,
557 U.S. 52 (2009) 20

Dolan v. City of Tigard,
512 U.S. 374 (1994) 22, 27, 28

Graham v. Florida,
560 U.S. 48 (2010) 11, 21

Harmelin v. Michigan,
501 U.S. 957 (1991) 4, 11, 21, 22

Koontz v. St. Johns River Water Mgmt. Dist.,
133 S. Ct. 2586 (2013) ..... *passim*

Mackey v. Montrym,
443 U.S. 1 (1979) 6, 14, 15, 21

Michigan Dept. of State Police v. Sitz,
496 U.S. 444 (1990) 3, 6, 7, 9

Missouri v. McNeely,
133 S. Ct. 1552 (2013) ..... *passim*

Nollan v. Cal. Coastal Comm'n,
483 U.S. 825 (1987) 24, 27

Perez v. Campbell,
402 U.S. 637 (1971) 6

Richards v. Wisconsin,
520 U.S. 385 (1997) 17

Schmerber v. California,
384 U.S. 757 (1966) 13, 25

Schneckloth v. Bustamonte,
412 U.S. 218 (1973) ..... *passim*

See v. City of Seattle,
387 U.S. 541 (1987) 18

Sherbert v. Verner,
374 U.S. 398 (1963) 23

Skinner v. Ry. Labor Execs' Ass'n,
489 U.S. 602 (1989) 25

Solem v. Helm,
463 U.S. 277 (1983) 21

South Dakota v. Neville,
459 U.S. 553 (1983) ..... *passim*

Tate v. Short,
401 U.S. 395 (1971) 5

United States v. Lopez,
514 U.S. 549 (1995) 20, 22

CONSTITUTION

U.S. Const. amend. I 23

U.S. Const. amend. IV . . . . . *passim*

U.S. Const. amend. V 13, 23, 27

OTHER AUTHORITIES

Anthony Bertelli, *The Behavioral Impact of Drinking and Driving Laws*, POLICY STUDIES JOURNAL, 36:4 (2008) 8

Center for Disease Control, Alcohol-Impaired Driving Among Adults–United States, 2012 (Aug. 2015) 7

FBI, Crime in the United States 2014, Table 29 . . . 7

NHTSA, *Breath Test Refusals & Their Effect on DWI Prosecution* (No. 811551, July 2012) . . . 8, 9

NHTSA, *Breath Test Refusals in DWI Enforcement: An Interim Report* (No. 300, Aug. 2005) 9

NHTSA, *Refusal of Intoxication Testing: A Report to Congress* (Sept. 2008) 12

NHTSA, *Traffic Safety Facts*, 2014 Data 2 (No. 812231, Dec. 2015) 6, 7

Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) 26

STATEMENT OF INTEREST[1]

Amicus Mothers Against Drunk Driving (MADD) was founded in May 1980. Its mission is to end drunk driving, help fight drugged driving, support the victims of these violent crimes, and prevent underage drinking. In pursuit of those objectives, MADD participates actively in public and private studies, legislative initiatives, and law-enforcement programs aimed at reducing the incidence of alcohol-related roadway tragedies. MADD is one of the largest victim-services organizations in the United States. In 2015, for example, MADD provided a service to victims and survivors of drunk- and drugged-driving incidents every four minutes on average.

In 2006, MADD launched a new "Campaign to Eliminate Drunk Driving." One of the key aspects of this campaign is supporting law enforcement in their efforts to catch drunk drivers, keep them off the road, and discourage others from driving while under the influence of alcohol. The strict and swift enforcement of drunk driving laws, through arrest and prosecution, is essential to that effort. MADD supports law enforcement's use of all constitutionally permissible

---

[1] Under Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part and that no party or counsel for a party helped fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel funded work on the brief.

Under Supreme Court Rule 37.2, *amicus curiae* also notes that on March 11, 2016, Petitioners consented to the filing of this brief. On March 14 and 15, 2016, Respondents consented to the filing of this brief.

tools to prevent drunk driving. Some of the most effective enforcement tools are blood alcohol concentration (BAC) tests, to which drivers in all United States jurisdictions impliedly consent when receiving driver's licenses.

Some states have elected to impose modest criminal penalties on an individual's decision to withdraw that consent. The Supreme Courts of Minnesota and North Dakota have affirmed those statutory penalties. Reversal of those decisions threatens to hamper enforcement efforts against drunk drivers and, as a result, could lead to increased drunk driving and increased loss of life. The critical need to enhance, rather than hamper, such enforcement efforts implicates the core mission of MADD.

INTRODUCTION AND SUMMARY OF ARGUMENT

A drunk driver in a large SUV careens down a four-lane street after midnight. His blood alcohol level is several points over the legal limit. The driver's mental focus wanders in and out, and he struggles to keep his bleary eyes on the road ahead of him. In his stupor, he neglects the approaching intersection and the red traffic light that vainly warns him against the crossing traffic. His foot never leaves the gas pedal. The SUV T-bones a smaller sedan, instantly killing the smaller car's blameless, unsuspecting driver.

This daily occurrence remains one of the most pressing problems facing society. Every year, drunk drivers kill thousands and seriously injure many more. "'No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in

eradicating it.'" *Missouri v. McNeely*, 133 S. Ct. 1552, 1565 (2013) (plurality opinion) (quoting *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990)). And no one in these cases disputes either fact.

In the specific context of these drunk driving cases, the critical question is *not* whether a State may penalize an arrested driver's refusal to consent to a warrantless BAC test. A State may do that. *See South Dakota v. Neville*, 459 U.S. 553, 560 (1983) (emphasizing that a "penalty for refusing to take a blood-alcohol test is unquestionably legitimate"); *accord McNeely*, 133 S. Ct. at 1566 (plurality opinion) (highlighting the "significant consequences when a motorist withdraws consent").

The relevant question here is what "penalty" or "significant consequences" a State may choose in order to further its undisputed interest in trying to reduce the carnage caused by drunk driving. Minnesota and North Dakota permissibly impose severe loss-of-driving administrative penalties on BAC test-refusers. Those States choose also to impose on test-refusers modest criminal penalties—usually misdemeanors. Those penalties have no constitutional impediment in this setting. States have an undisputed high interest in roadway safety, which is reasonably related to encouraging arrested drivers not to withdraw consent for BAC tests. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973) (highlighting that "the community has a real interest in encouraging consent" to police searches).

The Court should reject the attempt of Petitioners and supporting *amici* to impose a novel categorical rule against all "criminal" penalties. Petitioners and their

supporters defend their proposed rule only by *assuming* that all penalties somehow "cross the Rubicon" into unconstitutional territory simply by donning the label, "criminal." But no such rule exists in the Court's Fourth Amendment jurisprudence, or anywhere else. Indeed, the Court has generally rejected categorical, single-criterion rules for the Fourth Amendment. *See McNeely*, 133 S. Ct. at 1563. That is particularly true in the area of consent searches. *See Schneckloth*, 412 U.S. at 227 Petitioners rely on a few isolated cases involving other rights or involving other, non-drunk-driving settings where core privacy interests are greater. The cases are easily distinguished on those grounds.

The unconstitutional conditions doctrine also does not support a new *per se* rule against all criminal penalties. That doctrine, applied inconstantly in other contexts, has never been applied in a Fourth Amendment case. Even if it does apply, the relatively minor criminal penalties imposed by the state statutes easily satisfy the "nexus" and "rough proportionality" factors used in other settings.

In considering the appropriateness of particular penalties, the Court generally defers to state choices because penalties are within the province of state legislatures and because of the inherent nature of our nation's federal system. *See Harmelin v. Michigan*, 501 U.S. 957, 998-999 (1991) (Kennedy, J., concurring). Here, the power of federalism is even greater where States attempt to find effective means to combat drunk driving. Evidence supports the salutary effect of modest criminal penalties to reduce refusals and increase drunk driving convictions.

Finally, Petitioners' unprecedented *per se* proposal to ban all "criminal" penalties cannot be right because it would produce absurd results. Their categorical ban would mean that, faced with an arrested drunk driver who refused a BAC test, States could choose the hugely onerous "civil" penalty of, for example, a 3-year driving license revocation and a $10,000 fine, but could not employ the relatively minor "criminal" consequence of one hour in jail.

Nothing in the plain language of the Fourth Amendment (or anywhere else in the Constitution) requires or supports such a sweeping rule. This Court should not create an unprecedented categorical ban on modest criminal penalties, but should continue to permit state legislatures in the federalism laboratory to experiment with the most effective mix of incentives to reduce and ultimately end the undisputed scourge of drunk driving.

ARGUMENT

I. STATES HAVE A COMPELLING INTEREST IN DRUNK DRIVING ENFORCEMENT.

A. The Court And The Parties Accepted The Compelling State Interest.

The Court has long recognized the harm caused by drunk drivers. *See, e.g.*, *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield."); *Tate v. Short*, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring) (acknowledging "the problems of traffic irresponsibility and the frightful

carnage it spews upon our highways"); *Perez v. Campbell*, 402 U.S. 637 (1971) (Blackmun, J., concurring) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars."). "The carnage caused by drunk drivers is well documented." *Neville*, 459 U.S. at 558; *accord Sitz*, 496 U.S. at 451 ("Media reports of alcohol-related death and mutilation on the Nation's roads are legion.").

The Court has also recognized a State's "paramount interest in preserving the safety of its public highways" and creating "deterrent[s] to drunken driving." *Mackey v. Montrym*, 443 U.S. 1, 17–18 (1979). A State also has a recognized "interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings" and thus is entitled to offer a "strong inducement to take" a BAC test. *Id.* at 18.

Petitioners and their supporters acknowledge—as they must—that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." (Brief for Petitioner Birchfield ("Birchfield Br.") at 20; *see also* Motion of Indiana Tech Law School at 8 (acknowledging a criminal refusal statute "admittedly achieves worthy policy objectives")). Public safety is an undisputed, compelling reason for States to save lives through reasonable legislative deterrents to drunk driving.

B. Drunk Driving Is Still A "Pressing Problem."

Drunk driving continues to plague state roadways. In 2014, 9,967 people died in drunk driving crashes. National Highway Traffic Safety Administration (NHTSA), *Traffic Safety Facts*, 2014 Data 2

(No. 812231, Dec. 2015) *available at* http://www-nrd.nhtsa.dot.gov/Pubs/812231.pdf. That still-astounding number is thankfully lower than the 25,000 deaths per year mourned in 1990 in *Sitz*. *See* 496 U.S. at 451. But drunk driving deaths still remain a significant portion of total vehicle fatalities—nearly one third of all 2014 traffic deaths. *See* NHTSA, 2014 Data 2. In that year, drunk driving killed an American every 53 minutes. *Id.* Drunk driving crashes cost an estimated $49.8 billion in 2010. *Id.*

Despite "121 million self-reported episodes of alcohol-impaired driving among U.S. adults each year," Center for Disease Control, Alcohol-Impaired Driving Among Adults–United States, 2012 (Aug. 2015), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6430a2.htm, only 1.1 million drivers were arrested for driving under the influence of alcohol or narcotics in 2014. FBI, Crime in the United States 2014, Table 29 (Estimated Number of Arrests), *available at* https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-29. Many of those were habitual drunk drivers, in need of stiffer penalties handed out to repeat offenders.

Improved enforcement of drunk driving laws has contributed greatly to the success over the years. Enforcement, including both arrests and convictions, reduces the harm caused by drunk driving through several mechanisms.

First, arresting and convicting drunk drivers removes those drivers from the road through imprisonment, license suspensions, or other penalties that restrict the operation of vehicles while impaired (such as ignition-interlock devices, which prevent an

individual from starting his or her car without breathing into the device and recording a blood alcohol reading under the legal limit). Every drunk driver off the road is one less potential source of crashes, injuries, and deaths.

Second, the strict enforcement of drunk driving laws has significant deterrent effects. Individuals who observe the consequences of driving drunk, including convictions and the resulting penalties, are less likely to drive drunk themselves. A 2008 study determined that individuals were less likely to drink and drive if they perceived a higher probability of being stopped or arrested by law enforcement. Anthony Bertelli, *The Behavioral Impact of Drinking and Driving Laws*, POLICY STUDIES JOURNAL, 36:4, 545–569 (2008).

C. Criminal Refusal Statutes Are Effective In Reducing Refusals And Increasing Convictions.

Roughly 20% of drivers asked to submit to BAC testing refuse to do so. *See* NHTSA, *Breath Test Refusals & Their Effect on DWI Prosecution* (No. 811551, July 2012). Refusing to take a BAC test does not mean the driver is innocent of drunk driving. But it does make it less likely that an impaired driver will be convicted for his extremely dangerous—potentially fatal—behavior. In a recent study, the refusal rates for states was inversely related to conviction rates for cities in the state. *Id.* at 42 ("As statewide refusal rates increased, overall conviction rates decreased linearly.").

Likewise, cities located in States that had lower refusal rates convicted more drunk drivers, thus

deterring them from driving drunk. *Id.* at v. By contrast, drivers in States with higher refusal rates can more readily skirt conviction for driving under the influence of alcohol by merely refusing to take a breath test. In fact, those previously convicted of drunk driving are more likely to refuse a test than first-time offenders. NHTSA, *Breath Test Refusals in DWI Enforcement: An Interim Report*, at 22 (No. 300, Aug. 2005). Repeat offenders gain an advantage through test refusal. *Id.* ("Repeat offenders often benefit from refusing the BAC test because it clouds the case just enough to give them a slight advantage in court proceedings. The administrative penalties are not severe enough to deter refusals by repeat offenders.").

Just like the sobriety checkpoints approved in *Sitz*, 496 U.S. at 455, refusal statutes with modest criminal penalties are effective and constitutionally permissible tools in the fight against drunk driving. The Court should permit them and thus enhance our States' ability to obtain drunk driving convictions, which is essential to drunk driving prevention.

II. MODEST CRIMINAL PENALTIES FOR TEST REFUSAL PERMISSIBLY FALL WITHIN THE BROAD RANGE OF LEGAL TOOLS ALREADY APPROVED BY THE COURT.

The courts below, the parties, and many *amici* have had trouble specifying the analytical framework presented by these cases. The discussions have wandered over a landscape that includes search incident to arrest, inherent reasonableness, diminished expectation of privacy, consent, unconstitutional conditions, and other concepts. But the Court need not

examine all of these possible trees because Petitioners have now identified the "proper analytical" forest. (Birchfield Br. at 30). At bottom, Petitioners seek reversal of their criminal convictions based on their "view" that "the Constitution *categorically* precludes States from attaching criminal penalties" to a refusal to consent to a BAC test after a drunk driving arrest. *Id.* (emphasis added).[2]

The Court should reject Petitioners' unprecedented *per se* proposal to categorically ban, by reason of the Constitution, *any* penalty for test refusal that can be labeled "criminal." The bases for rejecting that view are strong, and assorted.

First, Petitioners' proposed *per se* rule runs headlong into the Court's extensive history of recognizing the compelling state interest in highway safety, and providing law enforcement with the appropriate tools to combat drunk driving. Even more directly, the proposed rule cannot thread the needle through the Court's general approval of implied consent laws and specific approval of significant adverse consequences for withdrawal of that consent. *See Neville*, 459 U.S. at 560; *accord McNeely*, 133 S. Ct. at 1566.

Second, nothing in the Constitution or in the Court's jurisprudence requires a *per se* ban on all criminal

---

[2] Petitioners actually seek an even broader *per se* rule against attaching criminal penalties to any "assertion of an otherwise applicable Fourth Amendment right, whether or not the State purports to make acceptance of those penalties a condition for awarding a license or other benefit." (Birchfield Br. at 30). That broader issue is not raised by these cases.

penalties in this area. The Court's Fourth Amendment jurisprudence—epitomized in *Schneckloth* and *McNeely*—uniformly rejects such categorical rules in favor of a case-by-case analysis based on the totality of circumstances. Petitioners offer no precedent for the Court to announce a categorical constitutional ban on a penalty—no matter how insignificant—simply because the State calls the penalty "criminal." The few cases on which Petitioners rely do not support that *per se* rule and are easily distinguishable. The Court reversed criminal convictions in those cases not because of criminal penalties, but because the overall warrantless-search regime was otherwise impermissible under the Fourth Amendment. *See, e.g.*, *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2452 (2015) (statute requiring police access to hotel registry deemed facially invalid for lack of pre-compliance review); *Camara v. Mun. Ct. of San Francisco*, 387 U.S. 523 (1967) (prophylactic health inspection of residences). Here, however, the Court has repeatedly approved the universal implied consent laws and the serious penalties for withdrawal of that consent. Without a legal leg to stand on, Petitioners and *amici* resort to unsupported *ipse dixit*.

Third, a *per se* ban on certain penalty categories would be inconsistent with the Court's general penalty jurisprudence. The Court constitutionally prohibits entire penalty categories only in the most extreme cases. *Compare Graham v. Florida*, 560 U.S. 48 (2010), *with Harmelin*, 501 U.S. at 957. In the vast majority of situations, federalism requires deference to States' reasonable penalty choices. The modest criminal penalties (almost always misdemeanors) in the North Dakota and Minnesota statutes at issue here are

reasonable legislative measures to encourage valuable BAC tests and combat the undisputed harms caused by drunk drivers. In fact, the federal government encourages those penalties. *See* NHTSA, *Refusal of Intoxication Testing: A Report to Congress*, at 20 (Sept. 2008). ("States should review their laws and practices to ensure that refusal to take a BAC test is *a criminal offense* and that the penalties are greater than those for conviction on an impaired driving offense.") (emphasis added).

A. States May Place "Significant Consequences" On a Motorist's Withdrawal of Implied Consent.

Petitioners' proposed *per se* ban on criminal penalties does not overcome the Court's long history of affirming drunk driving convictions. Petitioners and their *amici* noticeably give short shrift to those cases. The cases collectively affirmed the compelling state interest in highway safety, in combatting drunk driving, and in using BAC tests as a reasonable and important tool in that fight. Most importantly, the cases approved placing significant consequences on an arrested driver's refusal to consent to warrantless BAC tests.

1. The Court Has Historically Supported Law Enforcement Efforts To Combat Drunk Driving, Including The Use Of BAC Tests.

In 1957, the Court first confronted and approved BAC tests in the drunk driving context. *See Breithaupt v. Abram*. After recognizing the "increasing slaughter on our highways" from "avoidable" drunk driving, the

Court held that the extraction of blood from an unconscious drunk driver did not violate the Due Process Clause. *Id.* at 439. The Court approved blood tests generally and specifically a driver's consent to such tests as "part of a sensible and civilized system protecting himself as well as other citizens not only from the hazards of the road due to drunken driving, but also from some use of dubious lay testimony." *Id.* at 435 n.2.

Then in *Schmerber v. California*, 384 U.S. 757 (1966), the Court upheld a compelled warrantless blood test against claims that the test violated the Fourth and Fifth Amendments. The Court rejected the argument that BAC tests *per se* constitute compelled self-incrimination. The Court instead observed that a blood test constitutes a search such that a warrant is "ordinarily required." *Schmerber*, 384 U.S. at 770. Turning to the "special facts" of that case, the Court held that the warrantless search was "appropriate" because the officer "might reasonably have believed that he was confronted with an emergency" that "threatened the destruction of evidence," namely the dissipating alcohol in the driver's blood. *Id.* at 770–771.

Even during what was arguably the most active expansion of criminal defendant constitutional rights in history, the Court avoided imposing *per se* rules that would benefit drunk drivers, and the Court never reversed a drunk driving conviction. The Court should not do either now.

2. The Court Has Approved Implied Consent Laws.

The Court has broadly approved searches pursuant to consent as "a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth*, 412 U.S. at 228. As recently noted in *McNeely*:

> [A]ll 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose *significant consequences* when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.

133 S. Ct. at 1566 (plurality opinion) (emphasis added) (citations omitted); *accord Breithaupt*, 352 U.S. at 435 n.2 (discussing implied-consent laws and assuming "that a driver on the highways in obedience to a policy of the State, would consent to have a blood test made").

In 1979, the Court directly addressed and approved such implied-consent laws in *Montrym*, 443 U.S. at 1. Because of "the compelling state interest in highway safety," the Court upheld a State scheme that subjected drunk drivers to a penalty (summarily suspended license) for refusing a blood alcohol test. *Id.* at 19. The Court recognized that "[a] state plainly has the right to offer incentives for taking a test that provides the most

reliable form of evidence of intoxication for use in subsequent proceedings." *Id.* at 19; *accord id.* at 18 (approving "strong inducement to take the breath-analysis test"). The Court held that the penalty itself could validly serve "as a deterrent to drunk driving." *Id.* at 18.

Then in *Neville*, the Court explicitly approved a State's right to impose test-refusal penalties and consequences against an arrested drunk driver. After cataloguing the "carnage caused by drunk drivers," *Neville*, 459 U.S. at 558, the Court held that states may place "a price" on a drunk driver's choice to withdraw implied consent and not submit to a BAC test. *Id.* at 560. *Neville* held that "a penalty for refusing to take a blood-alcohol test is *unquestionably* legitimate, assuming appropriate procedural protections." *Id.* (discussing license suspension and citing *Mackey*) (emphasis added). The Court also permitted a penalty tied to the criminal context that "discourages the choice of refusal by allowing the refusal to be used against the defendant at trial." *Id.* Indeed, the Court highlighted that "the criminal process often requires suspects and defendants to make difficult choices." *Id.* at 564. The state-imposed adverse consequences did not give rise to "impermissible coercion" and did not "directly compel respondent to refuse the test, for it gave him the choice of submitting to the test or refusing." *Id.* at 562.

Most recently, in *McNeely*, the Court rejected a proposed *per se* rule in this precise context, specifically, a rule that all BAC tests present an exigency that justifies an exception to the Fourth Amendment. A plurality described implied consent laws as being one available tool among the "broad range of legal tools to

enforce" drunk driving laws. *McNeely*, 133 S. Ct. at 1566. The opinion cited *Neville* as support for the "significant consequences" that States may impose under those approved implied consent laws. Some of those approved significant consequences can be severe, as Petitioners themselves highlight. *See* Birchfield Br. at 22-23 (describing consequences of license suspension).

Thus, the Court has approved the use of severe test-refusal penalties, such as license suspension and admission of test-refusal evidence at trial. Petitioners do not meaningfully challenge those Court-approved penalties. The Court should reject Petitioners' unsupported attempt to impose an arbitrary, overbroad *per se* rule against more modest criminal penalties.

B. No Constitutional Rule Categorically Precludes Criminal Penalties Regarding Consent To Fourth Amendment Searches.

Petitioners and their *amici* seek an unprecedented *per se* rule against any consequence for withdrawing implied consent to a BAC test if that penalty bears the label "criminal." Petitioners' primary brief posits their collective view that "the Constitution *categorically* precludes States from attaching criminal penalties to the assertion of an otherwise applicable Fourth Amendment right." (Birchfield Br. at 30 (emphasis added)). *Amicus* ACLU proposes an even broader blanket rule for all constitutional contexts under which "a State may not subject individuals to criminal sanctions simply because they have asserted a constitutional right." (Brief for the American Civil Liberties Union ("ACLU Am. Br.") at 10). Petitioners

never discuss the actual circumstances of the cases presented here and the relatively modest penalties to which the defendants were subjected because of their convictions under the criminal test-refusal statutes.

Such *per se* rules do not fit the Fourth Amendment. The Court made that clear in this very context when it rejected Missouri's proposed "*per se* rule for blood testing in drunk driving cases." *McNeely*, 133 S. Ct. at 1560. The Court held that Fourth Amendment cases require application of a fact-specific, "totality of the circumstances approach." *Id.* at 1559. The Court could not "accept the 'considerable overgeneralization' that a *per se* rule would reflect." *Id.* at 1561 (quoting *Richards v. Wisconsin*, 520 U.S. 385, 393 (1997)).

Petitioners nevertheless propose a *per se* approach to the issue of consent, positing categorically that "[c]onsent is no consent at all if the person giving it is forbidden from declining on pain of criminal punishment." (Birchfield Br. at 22). But the Court has rejected *per se* rules in the specific consent-to-search context. Recognizing "the legitimate need for such searches," Justice Stewart, writing for the majority, marshaled many consent cases to show that in "determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of circumstances." *Schneckloth*, 412 U.S. at 226.[3] The Court found that "none of [the decisions] turned on the presence or absence of a single controlling criterion." *Id.* Justice Stewart reviewed other constitutional

---

[3] Petitioners make no meaningful attempt to conduct a totality of circumstances analysis on the facts of these cases and the particular statutory penalties at issue. (*See* Birchfield Br. at 22.)

contexts in which a police encounter is deemed "inherently coercive," but likewise rejected those *per se* approaches for consent searches under the Fourth Amendment. *Id.* at 240.

Petitioners and their *amici* present no Fourth Amendment case in which the Court has adopted a *per se* rule barring all criminal penalties. Instead, they rely on a handful of cases reversing criminal convictions—not because of a *per se* bar—but because the overall "search regimes" at issue were constitutionally flawed. *Patel*, 135 S. Ct. at 2452 (statute requiring police access to hotel registry deemed facially invalid for lack of pre-compliance review); *accord Camara v. Mun. Ct. of San Francisco*, 387 U.S. 523 (1967) (administrative public health inspection of residence violated Fourth Amendment); *See v. City of Seattle*, 387 U.S. 541 (1987) (administrative public health inspection of commercial warehouse violated Fourth Amendment). The Court explicitly granted certiorari in *Camara* and *See*, not to look at criminal penalties, but "to re-examine" the entire subject of "whether administrative inspection programs, as presently authorized and conducted violate Fourth Amendment rights." *Camara*, 387 U.S. at 525.

Petitioners and *amici* over-rely on a single clause at the end of *Camara* that "appellant may not constitutionally be convicted for refusing to consent to the inspection." (Birchfield Br. at 31 (quoting *Camara*, 387 U.S. at 540)). That does not require reversal here. The defendant in *Camara* could not "constitutionally be convicted" because the entire inspection scheme was unconstitutional. Nothing in that clause—or in any

other case from this Court—announces a blanket ban of all criminal penalties in the Fourth Amendment context.

Unable to muster applicable and persuasive precedent, Petitioners invoke adverbs and generalized assertions that insufficiently support their constitutional argument. Petitioner Beylund proclaims (without proof) that all criminal penalties are "[s]elf-evidently" and "patently" coercive. (Beylund Br. at 11). He tries vainly to valorize his categorical anti-criminalization position with the claim that it is a matter of "simple common sense" that "is beyond cavil," and while the opposing view is "bewildering." *Id.* at 11–12. Similarly, Petitioner Birchfield offers only his *ipse dixit* that the difference between all (unspecified) criminal penalties and civil license revocation penalties "should be obvious." (Birchfield Br. at 40). It is not obvious, and such categorical positions have never been recognized or adopted in any case from this Court.

The *amici* supporting Petitioners fare no better. The ACLU asserts without meaningful support that permissible regulatory penalties "are a far cry" from criminal penalties and that there is a "constitutional gulf" between the two. (ACLU Am. Br. at 13–14). Without actual case law to map that alleged gulf, the ACLU turns to fiat, declaring that "it is simply not a close question" that all criminal penalties are "over the line." *Id.* at 17 The DUI Defense Lawyers advance even hotter rhetoric by asserting that all criminal penalties are "an entirely other thing" from the consequences already approved by the Court, and that modest criminal penalties point the nation toward "Stalin's Soviet Union" and "Hitler's Nazi Germany."

(DUI Def. Law. Br. at 28, 31). That hyperbole is unwarranted and fictitious, as demonstrated by the many years that Minnesota and North Dakota, among other States, have had effective test-refusal statutes with modest criminal penalties and the fact that the federal government recommends such statutes to ameliorate drunk driving.

C. In The Interest Of Federalism, States Generally Have Wide Latitude To Pursue Compelling Interests And To Impose Penalties.

Petitioners' proposed constitutional bans on all implied-consent penalties labeled "criminal" also runs counter to basic federalism principles and this Court's concomitant strong deference to reasonable state choices when pursuing compelling state interests—especially with regard to penalties. Through criminal refusal statutes, a national safer-highway experiment is proceeding "'through the workings of normal democratic processes in the laboratories of the States.'" *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 79 (2009) (Alito, J., concurring) (quoting *Atkins v. Virginia*, 536 U.S. 304, 326 (2002) (Rehnquist, C. J., dissenting)); *accord United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J. concurring) (highlighting "the theory and utility of our federalism , for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear"). Some States have adopted criminal refusal statutes; others have not. *See id.* (Kennedy, J., concurring) (noting state law differences and "disagreement about how best to accomplish" an agreed goal of

prohibiting guns near schools). Petitioners do not discuss federalism at all.

As discussed above, the Court has repeatedly confirmed, in many different formulations, the horrific damage levied by drunk drivers as well as the States' compelling interest in reducing it. "We have traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety. States surely have at least as much interest in removing drunk drivers from their highways as in summarily seizing mislabeled drugs or destroying spoiled foodstuffs." *Montrym*, 443 U.S. at 17. States should have that same "great leeway" in selecting modest criminal penalties to pursue their compelling interest in combatting drunk driving.

This Court limits "categorical rules" restraining State penalty discretion to only the most extreme and disproportionate punishments. *See Harmelin*, 501 U.S. at 1001 (Kennedy, J., plurality opinion) (stating that the Constitution "forbids only extreme sentences that are 'grossly disproportionate' to the crime") (quoting *Solem v. Helm*, 463 U.S. 277, 288 (1983)); *see also, e.g.*, *Graham v. Florida*, 560 U.S. at 60–61 (categorically prohibiting life sentences without parole for juvenile defendants). The controlling plurality opinion in *Harmelin* identified four bases for such limitations, including federalism, referring specifically to: "the inevitable, often beneficial result of the federal structure." 501 U.S. at 999 (citing *Solem*). "Our Constitution is made for people of fundamentally differing views. Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some States will always bear the distinction of treating

particular offenders more severely than any other State." *Id.* at 1000 (internal quotations and citations omitted).

Nothing in the words of the Fourth Amendment, or anywhere else in the Constitution, requires Petitioners' proposed *per se* nationwide ban on modest criminal penalties. Such a ban would improperly and unnecessarily "foreclose[] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

III. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE DOES NOT INVALIDATE THE TEST REFUSAL STATUTES AT ISSUE.

The unconstitutional conditions doctrine also does not support a new *per se* rule against all "criminalization" penalties for an arrestee's refusal to submit to chemical testing when arrested for drunk driving. Foremost, the Court has never—and seemingly no court has ever—applied the doctrine in the Fourth Amendment context. Indeed, "[a]lthough it has a long history, the 'unconstitutional conditions' doctrine has for just as long suffered from notoriously inconsistent application; it has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question." *Dolan v. City of Tigard*, 512 U.S. 374, 407 n.12 (1994); *see also Beylund v. Levi*, 859 N.W.2d 403, 411 (N.D. 2015) (expressing doubt whether the unconstitutional conditions doctrine "applies to a constitutional challenge based on the Fourth Amendment").

As applied to date, the doctrine serves to avoid extortionate governmental demands that coerce a person into waiving certain constitutional rights, such as the First Amendment right to free exercise of one's religion, *Sherbert v. Verner*, 374 U.S. 398, 404 & n.6 (1963), or the Fifth Amendment right to just compensation for property takings, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). Here, the Petitioners raise concerns stemming from the Fourth Amendment, stating that the Minnesota and North Dakota test-refusal statutes improperly coerce mandatory advance surrender of an arrestee's constitutional right to be free from unreasonable searches and seizures. Petitioners are incorrect.

The Court should uphold application of the statutes, including the imposition of criminal penalties for qualifying test refusals. First, the statutes do not condition the privilege of soberly driving on state roadways upon the surrender of one's Fourth Amendment right. Thus, the unconstitutional conditions doctrine is not implicated. Second, even if there were a constitutional right to refuse a chemical blood-alcohol test, there is both a nexus and proportionality between the state-provided privilege to drive and the conditions imposed in exchange for that privilege, namely, requiring a driver to consent to a blood-alcohol test upon probable cause of drunk driving or else accept enumerated penalties for a refusal. *Koontz*, 133 S. Ct. at 2591 (requiring a "nexus" and "rough proportionality").

The cases before the Court are not ones in which the government has, through legislation, engaged in "out-and-out extortion" in an effort to thwart an

individual's constitutional rights, as required to support application of the unconstitutional conditions doctrine. *Koontz*, 133 S. Ct. at 2595 (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (referencing "an out-and-out plan of extortion"))). Instead, the statutes reasonably assist state governments in their perpetual efforts to combat the well-documented "carnage caused by drunk drivers," the tragedies of which the Court has "repeatedly lamented." *Neville*, 459 U.S. at 558.

A. Test Refusal Does Not Implicate a Constitutional Right Under The Fourth Amendment.

The unconstitutional conditions doctrine may invalidate legislation only when the State has granted a benefit, such as the privilege to drive, on the condition that the beneficiary surrender a *constitutional* right. *E.g.*, *Koontz*, 133 S. Ct. at 2594. In the Minnesota and North Dakota statutes here at issue, as in eleven other States, it is a crime for a person arrested for driving while impaired to refuse to submit to a chemical blood-alcohol test. But as the Court noted in *Neville*, addressing implied-consent legislation, the right to refuse a chemical test is *not* a constitutional right. An arrestee's "right to refuse the blood-alcohol test, by contrast [to a right bearing constitutional dimension], is simply a matter of grace bestowed by the [state] legislature." *Neville*, 459 U.S. at 565. Because prosecution for test refusal does not implicate a constitutional right under the Fourth Amendment, the unconstitutional conditions doctrine does not apply.

To be sure, a person suspected of drunk driving has a constitutional right not to be tested without a warrant or a valid exception to the warrant requirement. *See, e.g.*, *McNeely*, 133 S. Ct. at 1556 (rejecting a *per se* exigency rule as "an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases"). Actual testing of an arrestee involves a search and seizure for purposes of the Fourth Amendment. *E.g.*, *Schmerber*, 384 U.S. at 767 ("Such [blood] testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of th[e Fourth] Amendment."); *Skinner v. Ry. Labor Execs' Ass'n*, 489 U.S. 602, 616–617 (1989) (determining that taking a blood, breath, or urine sample implicates the Fourth Amendment). In the state statutes here at issue, however, the arrestee may at all times refuse to be subjected to a chemical blood-alcohol test. In those instances, the Fourth Amendment continues to limit the State's authority to search his body and seize a sample of blood for chemical testing. The constitutional right to be free from unauthorized searches and seizures is never surrendered.

Suspected drunk drivers, however, have no constitutional right to *refuse* to be tested—that is, to withhold consent—without penalty, including criminal prosecution for that refusal. *Neville*, 459 U.S. at 560 ("This permission [to refuse a test] is not without a price, however."). If an arrestee refuses the test, specified civil and criminal penalties can flow from that choice. The Court has "recognize[d], of course, that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects

and defendants to make difficult choices." *Id.* at 564. The Minnesota and North Dakota test-refusal statutes can present arrestees with a difficult choice. But the unconstitutional conditions doctrine does not prevent state governments from presenting that choice in the first instance.

B. Even If There Were a Constitutional Right to Refuse Testing, The Condition Imposed Is Closely Related to the Government's Valid Objectives.

Even if a person suspected of drunk driving were afforded a constitutional right to refuse testing, the civil and criminal penalties attendant to that right do not warrant invalidating the statutes under the unconstitutional conditions doctrine. The doctrine's "overarching principle" is to "prevent the government from coercing people into giving" up their constitutional rights. *Koontz*, 133 S. Ct. at 2594. The Court, however, "has never developed a coherent rationale for determining when [the availability of choices] rise[s] to the level of 'coercion.'" Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV 1413, 1428 (1989). The doctrine nonetheless requires coercion, sometimes referred to as extortion, in compelling individuals to relinquish a constitutional right. *E.g.*, *Koontz*, 133 S. Ct. at 2595, 2596, 2597, 2603 (repeatedly referencing applicability of the unconstitutional conditions doctrine in order to remedy "extortionate demands" imposed by a governmental condition).

A government's demands, expressed through legislation, are not unconstitutionally extortionate so long as "there is a 'nexus' and 'rough proportionality'

between the demands and the [benefits afforded]." *Koontz*, 133 S. Ct. at 2591. The Court announced the "nexus" and "rough proportionality" requirements in *Nollan*, 483 U.S. at 837, and *Dolan*, 512 U.S. at 386, respectively. Application of these requirements led to a conclusion in *Koontz* that, addressing the Fifth Amendment, "a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz*, 133 S. Ct. at 2591.

On this backdrop, the unconstitutional conditions doctrine looks to the purpose of the challenged condition. It invalidates only those laws having a challenged condition with no significant relevance to the governmental objective of the privilege that the government conditionally confers. Here, we have a clear nexus between the privilege to drive soberly on state roadways and the associated condition of consenting to a BAC test or, in lieu of the test, accepting civil and criminal penalties. As the Court expressed in *Nollan*, so long as the "condition serves the same governmental purpose" as the privilege, there is a sufficient nexus. 483 U.S. at 837 The requisite nexus is present here because both the privilege and the condition directly address the unassailable governmental interest in safe roads and preventing drunk driving. The Minnesota and North Dakota statutes take essential steps toward achieving that goal. The conditions could hardly be more tightly related to the statutes' legitimate public purposes. *Cf. id.* (observing that a nexus would be lacking where, for example, a state law "forbade shouting fire in a

crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury").

Equally, at least a "rough proportionality" exists between the conditions imposed and the benefits provided. *Dolan*, 512 U.S. at 386. Imposing criminal penalties on arrestees who refuse to consent to a blood-alcohol test is austere, but the seriousness of the effects of drunk driving eclipse those penalties. As the Court accurately observed nearly sixty years ago, "[t]he increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield." *Breithaupt*, 352 U.S. at 439. Yet the problem persists. Substantial conditions are warranted to address an even more substantial problem.

At its essence, the unconstitutional conditions doctrine serves to "forbid[] the government from engaging in 'out-and-out extortion' that would thwart" an individual's constitutional right. *Koontz*, 133 S. Ct. at 2595. No such extortion exists here. The statutes, including the imposition of modest criminal penalties upon refusal of a blood-alcohol test, appropriately leverage legitimate state interests in thwarting the problem of drunk driving. The statutes bear a clear nexus to those interests and endeavor to meet those interests through conditions that are clearly proportional to the problem.

CONCLUSION

For all these reasons and those stated in Respondents' separate briefs, this Court should affirm the three judgments below.

Respectfully submitted,

David Venderbush
Counsel of Record
Kirk T. Bradley
Brianna Kadjo
ALSTON & BIRD LLP
90 Park Avenue
New York, NY 10016
(212) 210-9400
dvenderbush@alston.com

Adam W Vanek
MOTHERS AGAINST
DRUNK DRIVING
511 E. John Carpenter Freeway
Suite 700
Irving, TX 75062
(469) 420-4517
adam.vanek@MADD.org

Attorneys for Amicus Curiae

March 22, 2016

Nos. 14-1468, 14-1470, 14-1507

IN THE

Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

WILLIAM ROBERT BERNARD, JR.,

Petitioner,

v.

MINNESOTA,

Respondent.

STEVE MICHAEL BEYLUND,

Petitioner,

v.

GRANT LEVI, DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Writs of Certiorari to the Supreme Courts of Minnesota and North Dakota

BRIEF OF THE NATIONAL COLLEGE FOR DUI DEFENSE AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DONALD J. RAMSELL
COUNSEL FOR NAT'L COL. FOR DUI DEFENSE
RAMSELL & ASSOCIATES, L.L.C.
128 S. County Farm Rd.
Suite F
Wheaton, IL 60187
(630) 665-8780

LEONARD R. STAMM *
COUNSEL FOR NAT'L COL. FOR DUI DEFENSE
GOLDSTEIN & STAMM P.A.
6301 Ivy Lane, Suite 504
Greenbelt, MD 20770
(301) 345-0122
stamm.lenny@gmail.com

Counsel for Amici Curiae

[Additional Counsel for *Amici Curiae* Listed on Inside Cover]

* Counsel of Record

February 11, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

JEFFREY T. GREEN
CO-CHAIR, NACDL AMICUS
COMMITTEE
1660 L Street, N.W.
Washington, D.C. 20005
(202) 872-8600

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. STUDIES INDICATE THAT WARRANT PROCEDURES ARE MORE EFFECTIVE IN REDUCING REFUSAL RATES THAN CRIMINALIZING REFUSALS	3
A. Studies By NHTSA Reveal That Criminal Refusal Laws Do Not Affect The Rate Of Refusals	3
B. Criminalizing Refusals Has Had No Impact On Prosecutions Of High Risk Refusers According To Government Studies	5
II. BECAUSE OF THE AVAILABILITY OF ELECTRONIC AND TELEPHONIC WARRANTS, LAWS CRIMINALIZING REFUSALS TO SUBMIT TO WARRANTLESS TESTS IN IMPAIRED DRIVING CASES ARE UNNECESSARY	6
A. States Continue To Successfully Prosecute Thousands Of Drunk Driving Cases After Police Obtain Warrants To Draw Blood	8
B. Technology Advances Allow Police To Obtain Warrants In Minutes	10
1. States Have E-Warrant Procedures	13
2. Telephonic Warrants May Be Granted In Minutes	17

TABLE OF CONTENTS—continued

Page

3. Warrants By Facsimile Are Also Available To Speed The Process 18

III. THREAT OF INCARCERATION IS A RECOGNIZED MEANS OF PSYCHOLOGICAL COERCION AND IS WELL-ESTABLISHED AS A TOOL OF BEHAVIOR MODIFICATION. YET SUCH LEGISLATIVE TECHNIQUES RUN AFOUL OF THE FOURTH AMENDMENT 18

CONCLUSION 22

APPENDICES

APPENDIX A: NHTSA Study 2008, Figure 1. Breath Test Refusal Rates, 2005 ..... 1a

APPENDIX B: NHTSA Study 2008, Figure 2. Breath Test Refusal Rates, 2001 and 2005 ..... 2a

APPENDIX C: NHTSA Study 2011, Figure 1. Breath Test Refusal Rates by State, 2011..... 3a

APPENDIX D: NHTSA Study 2011. Comparison of BAC Test Refusal Rates in 2005 and 2011 ..... 4a

APPENDIX E: Superior Court of California, County of Napa, Search Warrant 5a

APPENDIX F: States That Expressly Allow Electronic or Telephonic Submission and Reception of Warrant Applications and/or Search Warrants..... 11a

APPENDIX G: States That Specify Written or In Person Applications, or Lack Mention of Electronic Submission 13a

TABLE OF CONTENTS—continued

Page

APPENDIX H: States Actively Using Warrants to Draw Blood in DUI Cases 14a

TABLE OF AUTHORITIES

CASES Page

City of Ontario v. *Quon*, 130 S. Ct. 2619 (2010) 12
People v. *Peck*, 38 Cal. App. 3d 993 (Cal. Ct. App. 1974) 11
Schmerber v. *California*, 348 U.S. 757 (1966) 11
State v. *Brown*, 721 P.2d 1357 (Or. 1986) ... 7
State v. *Rodriguez*, 156 P.3d 771 (Utah 2007) 12
United States v. *Baker*, 520 F.Supp. 1080 (S.D. Iowa 1981) 12
United States v. *Bozada*, 473 F.2d 389(8th Cir. 1973) 8
United States v. *Ford*, 56 F.3d 265 (D.C. Cir. 1995) 12
United States v. *McEachin*, 670 F.2d 1139 (D.C. Cir. 1981) 12
United States v. *Patino*, 830 F.2d 1413 (7th Cir. 1987) 12
Willig v. *Rapaport*, 81 A.D.2d 862 (N.Y.A.D. 1981) 20

COURT DOCUMENT

Amici Br. National College for DUI Defense et al. at 4, *Missouri* v. *McNeely*, No. 11-1425 (S. Ct. Dec. 17, 2012) 8, 9

RULE

Utah R. Crim. P. 40 (1)(1) 15

OTHER AUTHORITIES

59 C.J.S. Mortgages § 184 (2009) 20

TABLE OF AUTHORITIES—continued

Page

A. Berning et al., U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin., DOT HS 811 098, *Refusal of Intoxication Testing: A Report to Congress* (2008)..... 3, 4, 5

Andrew H. Bean, *Swearing by New Technology: Strengthening the Fourth Amendment by Utilizing Modern Warrant Tech-nology While Satisfying the Oath or Affirmation Clause*, 2014 BYU L. Rev. 927 (2015) http://digitalcommons.law.byu.edu/lawreview/vol2014/iss4/5 13

Danielle Salisbury, *As part of larger effort to go paperless, judges now can electronically approve search warrants*, Mlive.com, http://www.mlive.com/news/jackson/index.ssf/2013/07/as_part_of_larger_effort_to_go.html (July 19, 2013)... 16

Donald L. Beci, *Fidelity to the Warrant Clause: Using Magistrates, Incentives, and Telecommunications Technology to Reinvigorate Fourth Amendment Jurisprudence*, 73 Denv. U. L. Rev. 293 (1996) 7, 13

Electronic On-Call Warrants San Bernardino Superior Court, California Courts: The Judicial Branch of California, http://www.courts.ca.gov/27655.htm (last visited Jan. 25, 2016) 14

TABLE OF AUTHORITIES—continued

Page

Esther S. Namuswe et al., U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin., DOT HS 811 881, *Breath Test Refusal Rates in the United States – 2011 Update* (2014) 3

Gazette Opinion: Evidence shows value of DUI search warrants, Billings Gazette, http://billingsgazette.com/news/opinion/editorial/gazette-opinion/gazette-opinion-evidence-shows-value-of-dui-search-warrants/article_f0d1513d-beb1-54b2-a903-b22ca26d2d7c.html (May 30, 2012) 18

Gregory T. Benefiel, *DUI Search Warrants: Prosecuting DUI Refusals*, The Kansas Prosecutor (Spring 2012) http://www.kcdaa.org/Resources/Documents/KSProsecutor-Spring12.pdf (last visited Feb. 9, 2016) 16

Jason Bergreen, *Utah Cops Praise Electronic Warrant System*, Salt Lake Trib., Dec. 26, 2008 15

Johannes Andenaes, *The General Preventive Effects Of Punishment*, 114 U. Pa. L. Rev. 949 (1966) 20

John Henry Hingson, III, *Telephonic and Electronic Search Warrants: A Fine Tonic for an Ailing Fourth Amendment*, The Champion, Sept./Oct. 2005 18

Justin H. Smith, *Press One for Warrant: Reinventing the Fourth Amendment's Search Warrant Requirement Through Electronic Procedures*, 55 Vand. L. Rev. 1591 (2002) 7, 8, 11

TABLE OF AUTHORITIES—continued

Page

Lindsey Erin Kroskob, *Police Take First Forced Blood Draw*, Wyoming Trib. Eagle, http://www.wyomingnews.com/news/article_2a6c7748-c565-55b5-89ae-bb411b5d80af.html (Aug. 19, 2011) 17

Michael Jacobson, *Kentucky e-Warrants case Study*, Warrant and Disposition Management Project, http://www.wdmtoolkit.org/~/media/Microsites/Files/Warrants and Dispositions/StateImplementations/Kentucky/KentuckyeWarrant Case Study.ashx (Oct. 2012)..... 16

Michael John James Kuzmich, *www.warrant.com: Arrest and Search Warrants by E-mail*, 30 McGeorge L. Rev. 590 (1999)..... 18

Palm Bay Florida Police, *Innovative Policing Creating a Safer Community* (2011) http://www.palmbayflorida.org/home/showdocument?id=5136..... 11

Pew Research Center, *Mobile Technology Fact Sheet*, http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet (last visited Jan. 25, 2016)..... 7

Ralph K. Jones et al., U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin., DOT HS 807 765, *Implied Consent Refusal Impact* (1991) 6

Samuel Williston, *A Treatise on the Law of Contracts* § 71:36 (Richard A. Lord, 4th ed. 2003) 20

TABLE OF AUTHORITIES—continued

Page

Sarah Rich, *Search Warrants With E-Signatures Come to California, Government Technology*, http://www.govtech.com/public-safety/Search-Warrants-With-E-Signatures-Come-to-California.html (Apr. 6, 2012) 13, 14

State of Utah, *e-Warrants: Cross Boundary Collaboration* (2008) http://www.nascio.org/portals/0/awards/nominations2008/2008/2008UT2-e-Warrants%20Submission%206.2.08fs1fs.pdf (last visited Feb. 9, 2016) 15

The Republic, *Editorial: County wise for using electronic warrants*, http://www.therepublic.com/view/local_story/Editorial-County-wise-for-usin_1435881618 (last visited Jan. 25, 2016).... 17

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are the National College for DUI Defense ("NCDD") and the National Association of Criminal Defense Lawyers ("NACDL").

NCDD is a nonprofit professional organization of lawyers, with over 2,200 members, focusing on issues related to the defense of persons charged with driving under the influence. Through its educational programs, its website, and its email list, the College trains lawyers to represent persons accused of drunk driving. NCDD's members have extensive experience litigating issues regarding breath blood and urine tests for alcohol and other drugs. NCDD has appeared as amicus curiae in several drunk driving cases before the Supreme Court of the United States.

NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 9,000 direct members in 28 countries - and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys - include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

---

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than Amici and their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In this brief, Amici make three arguments.

First, available empirical evidence indicates that using warrants is a more effective means of reducing refusal rates than criminal refusal statutes. There is no evidence that criminal refusal laws reduce refusals. Therefore, an opinion by this Court that criminal refusal laws violate the Fourth Amendment would not be likely to cause a reduction in the numbers of people who submit to alcohol or drug testing in future drunk driving prosecutions.

Second, since this Court decided *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013), the few jurisdictions where blood had been routinely obtained without a warrant were able to put in place procedures, such as telephonic warrants, to easily obtain warrants when necessary to obtain a test result. Other jurisdictions had processes already in place to take advantage of current technology and obtain warrants easily and efficiently. Warrant procedures are legal, efficient, and effective and should be encouraged.

Third, the threat of incarceration is always coercive. The Fourth Amendment does not permit Congress or a state legislature to legislate coercive means for obtaining "consent" to conduct a search.

For these reasons, this Court should reverse the decisions of the Minnesota and North Dakota Supreme Courts.

ARGUMENT

I. STUDIES INDICATE THAT WARRANT PROCEDURES ARE MORE EFFECTIVE IN REDUCING REFUSAL RATES THAN CRIMINALIZING REFUSALS.

A. Studies By NHTSA Reveal That Criminal Refusal Laws Do Not Affect The Rate Of Refusals.

The National Highway Traffic Safety Administration ("NHTSA") has released studies, including a recent update, examining the effect of refusal statutes on drunk driving enforcement. See A. Berning et al., U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin., DOT HS 811 098, *Refusal of Intoxication Testing: A Report to Congress* (2008) (hereinafter "2008 NHTSA Study") and Esther S. Namuswe et al., U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin., DOT HS 811 881, *Breath Test Refusal Rates in the United States – 2011 Update* (2014) (hereinafter "2011 NHTSA Study"). The studies looked at the rate of refusal to submit to an alcohol test in DUI cases.

While one obvious purpose of criminal refusal laws is to induce more suspected drunk drivers to consent to an alcohol test, available empirical evidence does not support a conclusion that this desired goal is achieved. The 2008 NHTSA study examined data from 2005. The data showed that in 37 states an overall refusal rate by state ranged from 2% at the low end to 81% at the high end. The 81% refusal rate in New Hampshire, a non-criminal refusal state, appears to be an outlier. The second highest refusal rate of 41% was reported in Massachusetts, another state without a criminal refusal statute. The refusal rate in states with criminal refusal statutes ranged

from 3% to 40%. The 40% refusal rate was reported in Florida, a state with a criminal refusal statute, and with the third highest refusal rate overall. The 2008 NHTSA Study also reviewed and compared figures from 2001.[2] None of these figures indicate a correlation between refusal rates and criminalization of refusal.[3]

The 2011 study reported data from 2011, and compared it to the 2005 data. The studies did not show meaningful changes. Some states reported a rise in refusals, and some states reported a drop. Others reported no change. Florida, a criminal refusal state, recorded the largest change, an *increase* of refusals from 40% to 82%.[4] New Hampshire, a state without a criminal refusal statute, noted a *decrease*, from 81% to 72%.

The 2008 study strongly recommended instituting procedures to allow police to obtain warrants in refusal cases as a "promising" way of obtaining a test result. See 2008 NHTSA Study at 11-15. The Study discussed the warrant experience in Arizona, Utah, Michigan, Oregon, California, and Nevada. It found favorable refusal rates in those jurisdictions and support from law enforcement. As is discussed in the next section of this brief, warrants are easy to obtain, and the implementation of warrant procedures has increased the numbers of test results available in DUI prosecutions.

---

[2] *See* 2008 NHTSA Study at 6.

[3] *See* Appendix A, NHTSA Study 2008, Figure 1. Breath Test Refusal Rates, 2005; *see* Appendix B, Figure 2. Breath Test Refusal Rates, 2001 and 2005.

[4] *See* Appendix C, NHTSA Study 2011, Figure 1. Breath Test Refusal Rates by State, 2011; *see* Appendix D, Comparison of BAC Test Refusal Rates in 2005 and 2011.

Put another way, a determination by this Court that the Fourth Amendment prohibits criminalizing refusal to submit to a test, and a reaffirmation from this Court of its holding in *McNeely* of a preference for using warrants, is more likely to improve test gathering than preservation of the status quo in criminal refusal states.[5]

B. Criminalizing Refusals Has Had No Impact On Prosecutions Of High Risk Refusers According To Government Studies.

It is often argued by the government that the criminalization of implied consent laws is a needed and effective tool to combat drunk driving. Such arguments are theoretical and unsupported by real data. Contrary to such an argument, a National Highway Traffic Safety Administration study of all fifty states'

---

[5] The 2008 study called for an increase in issuance of warrants to collect blood, and although it noted a higher conviction rate in states that criminalized refusal, because refusers could be convicted of DUI or refusal, it did not call for an increase in criminal refusal laws. The following refusal rates in 2005 in states with criminal refusal statutes were shown:

Alaska (Alaska Stat. § 28.35.032) 16%

Florida (Fla. Stat. 316.1932) 40%

Hawaii (Haw. Rev. Stat. § 291e-68) 11%

Kansas (Kan. Stat. § 8-1025) 27%

Louisiana (R.S. § 661(C)(1)(f)) 39%

Minnesota (Minn. Stat. § 169A.20) 13%

Nebraska (Neb. Rev. Stat. §§ 60-6,211.02 and 60-6,197) 8%

North Dakota (N.D.C.C. § 39-08-01(1)(e)) 14%

Vermont (23V.S.A. § 1201(b)) 17%

Virginia (Va. Code § 18.2-268.3) 3%

implied consent laws (where at the time 12 states had criminal sanctions for refusals) suggested that the criminalization of implied consent laws had very little impact overall:

> There is evidence that license suspension alone will not prevent refusal for many "hard core" refusers with a past history of DWI, test refusal, and other serious traffic offenses. Strong criminal sanctions (including jail terms) for refusal may help deter these individuals. However, we doubt that such sanctions alone will prevent many of this group of high-risk refusers from future refusals, and suspect that a large percentage will require treatment for other dysfunctional behaviors (including alcoholism) that are no doubt related to DWI and implied consent violations.[6]

This study found that many other factors (other than criminalization) had a greater effect on reducing the number of refusals, such as increasing the length of the license suspension and informing the public of the license sanctions for refusal.

II. BECAUSE OF THE AVAILABILITY OF ELECTRONIC AND TELEPHONIC WARRANTS, LAWS CRIMINALIZING REFUSALS TO SUBMIT TO WARRANTLESS TESTS IN IMPAIRED DRIVING CASES ARE UNNECESSARY.

Law enforcement argues that they have a compelling need to obtain samples of a driver's breath, blood, or urine for testing in order to successfully

---

[6] *See* Ralph K. Jones et al., U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin., DOT HS 807 765, *Implied Consent Refusal Impact* (1991).

prosecute impaired driving cases. But the present-day electronic and telephonic warrant process provides law enforcement with a swift and efficient method to obtain such evidence without doing harm to the Fourth Amendment.

"In this modern day of electronics and computers, we foresee a time in the near future when the warrant requirement . . . can be fulfilled virtually without exception." So said the Oregon Supreme Court nearly thirty years ago.[7] There is little doubt that mobile devices are pervasive in American culture. According to a recent study conducted by the Pew Research Center, as of January 2014, 90 percent of American adults owned cell phones, and as of October 2014. 64 percent owned smart phones, and a little less than half of those surveyed owned tablets.[8]

As some scholars have noted, the advent of modern telecommunication technology provides courts with the opportunity to narrow the use of the exigent circumstances exception as a justification for warrantless searches.[9]

Modern means of communication help facilitate seamless contact between law enforcement officials requesting search warrants in the field and judges

---

[7] *State* v. *Brown*, 721 P.2d 1357, 1363 n.6 (Or. 1986)

[8] *See* Pew Research Center, *Mobile Technology Fact Sheet*, http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet (last visited Jan. 25, 2016).

[9] *See* Donald L. Beci, *Fidelity to the Warrant Clause: Using Magistrates, Incentives, and Telecommunications Technology to Reinvigorate Fourth Amendment Jurisprudence*, 73 Denv. U. L. Rev. 293, 294–96 (1996); *see* Justin H. Smith, *Press One for Warrant: Reinventing the Fourth Amendment's Search Warrant Requirement Through Electronic Procedures*, 55 Vand. L. Rev. 1591, 1595-96 (2002).

reviewing the warrant applications. This modern technology serves to dramatically reduce the time needed for a judge to review an application and issue a warrant upon probable cause.[10]

Even if the need to obtain breath samples or blood samples is so great that the failure to get a sample reduces the conviction rate in impaired driving cases, that is not a legitimate reason to legislatively circumvent the warrant requirement: the answer is to modernize the warrant process and promote its efficiency. As the Eighth Circuit stated in *United States* v. *Bozada*: "If the processes of our government are such that police officers are unable to secure search warrants . . . then the cure for that problem is not to sacrifice the Fourth Amendment rights of our citizens, but to streamline the warrant procuring procedure."[11]

A. States Continue To Successfully Prosecute Thousands Of Drunk Driving Cases After Police Obtain Warrants To Draw Blood.

As was noted in *Amici* Br. National College for DUI Defense et al. at 4, *Missouri* v. *McNeely*, No. 11-1425 (S. Ct. Dec. 17, 2012) "[s]tates have had little difficulty enforcing their laws even when the police have been forced to obtain search warrants before withdrawing blood for alcohol testing." As the McNeely amicus brief demonstrated, states had obtained thousands of convictions by following a warrant process to collect blood. *Id.*

NHTSA studies demonstrated successful use of warrants in Arizona, Michigan, Oregon, and Utah.

---

[10] *See* Smith, *supra*, at 1625.

[11] 473 F.2d 389, 394–95 (8th Cir. 1973), *quoted in* Smith, *supra* note 9, at 1625–26.

Id.; NHTSA, Use of Warrants for Breath Test Refusal: Case Studies, DOT HS 810 852 (Oct. 2007), at 36 ("NHTSA Case Studies"). "Judges and prosecutors strongly supported warrants for blood draws because there are now more cases with BAC evidence, which has resulted in 'more guilty pleas, fewer trials, and more convictions.'" *Amici* Br. at 4, *McNeely*, No. 11-1425, *quoting* NHTSA Case Studies.

> Blood samples are obtained in a straightforward way. First, a police officer arrests the driver and asks for a breath sample. NHTSA Case Studies at 36. The officer informs the driver of the state's implied consent laws and penalties. *Id.* If the driver refuses to provide a breath sample, the officer requests a warrant for a blood sample by completing the standardized affidavit and warrant forms. *Id.* The officer then either electronically transfers the forms to the judge, magistrate, or prosecutor (or even reads them over the phone) and the warrant is then sworn over the telephone. *Id.; see also* Appendix B (forms used in Phoenix, Arizona). Once the warrant is granted, the driver must submit to the blood draw.

Id. at 5.

The entire process did not take more than two hours. "Police officers interviewed by NHTSA 'generally supported the use of warrants' and were 'willing to take the additional time . . . in order to obtain BAC evidence.'" *Id.* at 6 *quoting*, NHTSA Case Studies.

Since *McNeely* was decided, in the few jurisdictions where warrantless blood draws were the norm in refusal cases, law enforcement and the courts have been able to adapt easily to this Court's decision in *McNeely*.

The southern portion of the Baltimore-Washington Parkway in Maryland, for example, is patrolled by the United States Park Police. Cases are heard before Magistrates in the Southern Division of the United States District Court in Greenbelt, Maryland. Immediately after *McNeely* was decided, Magistrates instituted a telephonic warrant procedure in refusal cases. Officers place a telephone call to the Magistrate on duty. They relay the probable cause for a test and if the judge issues the telephonic warrant, the officer takes the suspect to Prince George's Hospital for a blood draw. The entire process is recorded and takes only a few minutes. As a result, there is a test in virtually every DUI case.

In California, a process was instituted where police fill out a written affidavit and obtain telephonic warrants easily and efficiently. See Appendix E – California warrant.

In short, any argument that requiring police to obtain a search warrant is too burdensome is not supported by the evidence. There are no statistics that show that states without criminal refusal laws are suffering as a result of their compliance with the search warrant process.[12]

B. Technological Advances Allow Police To Obtain Warrants In Minutes.

Advancements in communications technology have substantially expedited the process for obtaining search warrants, making it much easier to get a warrant within the relevant window of time. Using widespread electronic communications technology, police can obtain search warrants in minutes rather than

---

[12] *See*, generally, Appendix H, States Actively Using Warrants to Draw Blood in DUI Cases.

hours. There is no practical obstacle to obtaining warrants, such that the police need to criminalize refusals.

In 1966, when the Court decided *Schmerber* v. *California*, 384 U.S. 757 (1966), no state statute allowed for the issuance of warrants via telephone or other electronic means.[13] Police officers seeking warrants had to personally appear before a judge. But today, forty-two states have passed statutes that allow police officers to telephonically or electronically submit warrant applications and for judges to issue search warrants by one or more of the following methods: telephone, radio, facsimile, email, video conference, or text message. See Appendix F (listing statutes). Only a handful of state statutes still specify written or in person applications. See Appendix G (listing statutes). Moreover, even within states that have not expressly provided for electronic warrant procedures, police officers in some jurisdictions have nonetheless found ways to creatively utilize technology to expedite the process.[14]

---

[13] California adopted the first statute providing for oral submission of testimony in 1970, four years after this Court's holding in *Schmerber*. *See* Smith, *supra* at 1607; *People* v. *Peck*, 38 Cal. App. 3d 993, 998 (Cal. Ct. App. 1974) (The statute stated that "[i]n lieu of the written affidavit . the magistrate may take an oral statement under oath which shall be recorded and transcribed.").

[14] Even though Fla. Stat. Ann. § 933.07, does not address the use of technology to obtain a warrant, police officers in Palm Bay, have expedited the warrant process by emailing an affidavit to the judge and then videoconferencing with the judge via Skype. Palm Bay Florida Police, *Innovative Policing Creating a Safer Community* (2011), 10, http://www.palmbayflorida.org/home/showdocument?id=5136 "The process takes an average of *less than thirty minutes* in comparison to several hours it

This Court once stated that it is unwise to "elaborat[e] too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."[15] However that time has now arrived insofar as the search warrant process is concerned: emerging technology now makes the application procedure as seamless and swift as it has ever been, reducing the process from hours to minutes.

For example, a recent Utah case held that the availability of telephonic and electronic search warrants was a factor to consider when determining whether a warrantless blood draw was reasonable under the totality of the circumstances. The court upheld the search, but only after noting: "We are confident that were law enforcement officials to take advantage of available technology to apply for warrants, the significance of delay in the exigency analysis would markedly diminish."[16]

Federal courts have been considering the availability of telephonic warrants in an exigency analysis since at least 1981.[17]

Law review commentators also have observed that, with the state of electronics and telecommunications as it now exists, the exigency exception to the search warrant requirement may no longer be viable in its

---

would have taken using traditional means." *Id.* (emphasis added).

[15] *City of Ontario* v. *Quon*, 130 S. Ct. 2619, 2629 (2010).

[16] *State* v. *Rodriguez*, 156 P.3d 771 (Utah 2007).

[17] *United States* v. *McEachin*, 670 F.2d 1139, 1146 (D.C. Cir. 1981). See also *United States* v. *Ford*, 56 F.3d 265, 272 (D.C. Cir. 1995); *United States* v. *Patino*, 830 F.2d 1413, 1416-17 (7th Cir. 1987); *United States* v. *Baker*, 520 F.Supp. 1080, 1083-85 (S.D. Iowa 1981).

current form.[18] Any argument that suggests that a criminal refusal statute is necessary because a search warrant is too onerous and time-consuming to follow, disregards the obvious technologies that are available to even the smallest court systems in the country.

1. States Have E-Warrant Procedures.

Forty-two states allow for a warrant to be issued based upon sworn oral testimony. See Appendix F At least nineteen —Alaska, Arizona, Arkansas, California, Colorado, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Montana, New Jersey, New Mexico, Tennessee, Utah, Vermont and Washington —explicitly allow police officers to use "electronic means," "appropriate means" or "other reliable means" to apply for and receive a warrant.

Since California adopted the use of e-signature technology for search warrants, the warrant process even in a remote county of California (Butte) has been cut by hours. [19] There the entire process, from the original application to the judge's review, can be done electronically. Judges are given iPads for after-

---

[18] Andrew H. Bean, *Swearing by New Technology: Strengthening the Fourth Amendment by Utilizing Modern Warrant Technology While Satisfying the Oath or Affirmation Clause*, 2014 BYU L. Rev. 927 (2015), http://digitalcommons.law.byu.edu/lawreview/vol2014/iss4/5 ("This Comment submits that modern telecommunications technology has arrived at the point where the communication between a judge and a field officer to obtain a warrant is so seamless and requires so little time that the exigent circumstances exception should be virtually eliminated."); *see also* Beci, *supra*, at 294-96.

[19] Sarah Rich, *Search Warrants With E-Signatures Come to California*, Government Technology, http://www.govtech.com/public-safety/Search-Warrants-With-E-Signatures-Come-to-California.html (Apr. 6, 2012).

hours use. The county selected DocuSign for the digital signature capability. The same news article reported that "[g]overnment entities such as the city of Seattle, the Wisconsin Department of Children and Families, and the Regional Transportation Commission of Southern Nevada had alread implemented" the DocuSign system. *Id.* According to the DocuSign company, "officers [do not even] need to install or learn additional software," and "[a]fter an officer sends in the search warrant authorization request, the officer can enter a judge's contact information, which then is immediately sent to the judge for the digital signature – a process that can take only minutes to complete." *Id.*

A report on a program entitled "Electronic On-Call Warrants - San Bernardino Superior Court" stated that it uses electronic processing of all warrant types during non-court hours and all probable cause declarations. [20] Judicial review is provided by a standard browser application that can run on an iPad, or other mobile device. Judges can be notified of a warrant for processing by telephone, text message, or e-mail. According to the Court's own report:

> The response from judges and law enforcement has been very positive. Law enforcement has been very glad not to have to call a judge in the middle of the night (the system makes the initial contact). Judges have been very appreciative that this is up and running.

Id. In Utah, "[a]ll communication between the magistrate and the peace officer or prosecuting attorney requesting the warrant may be remotely transmitted by

---

[20] *Electronic On-Call Warrants San Bernardino Superior Court*, California Courts: The Judicial Branch of California, http://www.courts.ca.gov/27655.htm (last visited Jan. 25, 2016).

voice, image, text, or any combination of those, or by other means."[21] Utah has implemented an e-warrants system:

> The e-warrants system allows Utah law enforcement officers to enter search warrant affidavit information. The system then electronically notifies a prosecutor and forwards the affidavit for review. After review, an officer can transfer the affidavit to a magistrate, electronically notifying him or her of the waiting request. The magistrate can then electronically review the affidavit and generated warrant, electronically sign the warrant, or deny the request with comments, then electronically send the results back to the officer.[22]

Utah's e-warrants system has reduced the amount of time it takes to obtain a warrant from several hours to several minutes. Jason Bergreen, *Utah Cops Praise Electronic Warrant System*, Salt Lake Trib., Dec. 26, 2008 (explaining that it took five minutes to obtain an "e-warrant for a forced blood draw on a man arrested for DUI").

A study of the e-warrant system in Kentucky noted that Kentucky criminal justice practitioners experienced a variety of benefits from the e-Warrants application, including that it "only takes minutes to pro-

---

[21] Utah R. Crim. P 40(l)(1)

[22] State of Utah, *e-Warrants: Cross Boundary Collaboration* 1 (2008) http://www.nascio.org/portals/0/awards/nominations2008/2008/2008UT2-e-Warrants%20Submission%206.2.08fs1fs.pdf (last visited Feb. 9, 2016).

cess a warrant and only requires an Internet connection and logon credentials to do so."[23]

Similarly, police officers in Douglas County, Kansas, are able to obtain search warrants in fifteen minutes by emailing a request for a warrant to a judge's iPad, which the judge may sign and return via email. [24]

In Jackson, Michigan electronic warrants have replaced fax machines. According to a news story, "police can create and submit the documents while at the scene of a homicide or alleged drug stash or while trying to collect a blood sample from a suspected drunken driver, and judges can respond from anywhere."[25]

The use of such electronic warrant processes has been lauded in newspaper editorials. Recently, The Republic news in Indiana did just that in referencing drunk driving cases:

> Local police no longer need to request search warrants in person in front of a judge. Now they can send requests and receive signed search warrants with a few keystrokes, rather than a lot of driving and waiting time.

---

[23] Michael Jacobson, *Kentucky e-Warrants case Study*, Warrant and Disposition Management Project, http://www.wdmtoolkit.org/~/media/Microsites/Files/Warrants and Dispositions/State Implementations/Kentucky/Kentucky eWarrant Case Study.ashx (Oct. 2012).

[24] Gregory T. Benefiel, *DUI Search Warrants: Prosecuting DUI Refusals*, The Kansas Prosecutor, 18-19 (Spring 2012) http://www.kcdaa.org/Resources/Documents/KSProsecutor-Spring12.pdf (last visited Feb. 9, 2016).

[25] Danielle Salisbury, *As part of larger effort to go paperless, judges now can electronically approve search warrants*, Mlive.com, http://www.mlive.com/news/jackson/index.ssf/2013/07/as_part_of_larger_effort_to_go.html (July 19, 2013).

> Police can make the requests using their in-car computers, and judges and magistrates can electronically sign the warrant and return it via a secure communication link.
>
> Expediency is crucial when time is of the essence, such as when state law dictates that a blood draw for a person who refuses a breath test must be conducted in a certain amount of time.[26]

The Editorial concluded:

> Considering that this technology helps police do their job faster and more efficiently, the decision should be a no-brainer. *Id.*

2. Telephonic Warrants May Be Granted In Minutes.

The vast majority of the forty-two states that allow remote warrants specifically allow the submission of testimony and issuance of warrants over the telephone.[27] Telephonic warrants are more widespread than email or videoconferencing, and they are equally prompt. According to the Chief of Police in Cheyenne, Wyoming, obtaining a search warrant over the phone usually takes less than five minutes.[28] In Billings,

---

[26] The Republic, Editorial: *County wise for using electronic warrants*, http://www.therepublic.com/view/local_story/Editorial-County-wise-for-usin_1435881618 (last visited Jan. 25, 2016).

[27] These states include Alabama, Alaska, Arkansas, Arizona, California, Idaho, Indiana, Louisiana, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, South Dakota. Utah, Washington, Wyoming and Wisconsin.

[28] Lindsey Erin Kroskob, *Police Take First Forced Blood Draw*, Wyoming Tribune Eagle, http://www.wyomingnews.com/news/article_2a6c7748-c565-55b5-89ae-bb411b5d80af.html (Aug. 19, 2011).

Montana, it takes about fifteen minutes to obtain a warrant.[29]

3. Warrants by Facsimile Are Also Available To Speed The Process.

Even warrant procedures utilizing older technology, such as facsimile, can be rapidly processed.[30] In San Diego, 95 percent of the telephonic search warrants issued in 1973 were processed in less than 45 minutes.[31]

III. THREAT OF INCARCERATION IS A RECOGNIZED MEANS OF PSYCHOLOGICAL COERCION AND IS WELL-ESTABLISHED AS A TOOL OF BEHAVIOR MODIFICATION. YET SUCH LEGISLATIVE TECHNIQUES RUN AFOUL OF THE FOURTH AMENDMENT.

The obvious purpose of these criminal refusal statutes is to gain consent; compelled and involuntary consent. The threat of arrest and incarceration is a well-recognized behavior modification technique that is deliberately meant to be coercive. The use of the threat of punishment as a means of causing a person

---

[29] *Gazette Opinion: Evidence shows value of DUI search warrants*, Billings Gazette, http://billingsgazette.com/news/opinion/editorial/gazette-opinion/gazette-opinion-evidence-shows-value-of-dui-search-warrants/article_f0d1513d-beb1-54b2-a903-b22ca26d2d7c.html (May 30, 2012).

[30] John Henry Hingson, III, *Telephonic and Electronic Search Warrants: A Fine Tonic for an Ailing Fourth Amendment*, The Champion, Sept./Oct. 2005, at 38.

[31] Michael John James Kuzmich, *www.warrant.com: Arrest and Search Warrants by E-mail*, 30 McGeorge L. Rev. 590, 591 (1999).

to perform or refrain from performing a certain act dates back to ancient philosophers. As stated in 1966:

> General prevention has played a substantial part in the *philosophy of the criminal law.* It is mentioned in Greek philosophy, and it is basic in the writings of Beccaria, Bentham and Feuerbach. According to Feuerbach, for example, the function of punishment is to create a "psychological coercion" among the citizens. [Feuerbach, *Lehrbuch Des Gemeinen In Deutschland Peinlichen Rechts* 117 (1812)] The threat of penalty, consequently, had to be specified so that, in the mind of the potential malefactor, the fear of punishment carried more weight than did the sacrifice involved in refraining from the offense. The use of punishment in individual cases could be justified only because punishment was necessary to render the threat effective.
>
> * * *
>
> Notions of general prevention also have played a major part in *legislative actions.* This was especially apparent a hundred or a hundred and fifty years ago when the classical school was dominant. The Bavarian Penal Code of 1813, copied by many countries, was authored by Feuerbach and fashioned on his ideas.
>
> * * *
>
> Unlike mental health acts, penal laws are not designed as prescriptions for people who are in need of treatment because of personality troubles. While there are some exceptions, such as sexual psychopath acts and provisions in penal laws about specific measures to be used when dealing with mentally abnormal people or other special groups of delinquents, penal laws are

> primarily fashioned to *establish and defend social norms.* As a legislature tries to decide whether to extend or to restrict the area of punishable offenses, or to increase or mitigate the penalty, the focus of attention usually is on the ability of penal laws to modify patterns of behavior."[32]

So coercive is the threat of incarceration that it is recognized as a defense to the validity of a contract.[33] "The law is well settled that threats of arrest or imprisonment may constitute such duress as will render a contract entered into, or an act performed under the influence of such threat, voidable at the election of the person threatened. It is immaterial whether such person was guilty or innocent of the act for which arrest or imprisonment was threatened in order for there to be duress."[34]

Threats of incarceration and duress are not new tools in the arsenal of those who seek to induce cooperation. As stated in *Corpus Juris Secundum on Mortgages*: "Broadly stated, the threat of arrest or criminal prosecution used to obtain a mortgage, if it produces fear sufficient to overcome the will of the mortgagor, constitutes duress invalidating the instrument."[35]

* * *

---

[32] Johannes Andenaes, *The General Preventive Effects Of Punishment*, 114 U. Pa. L. Rev. 949, 951 -953 (1966) (footnotes included in text or omitted).

[33] *See, e.g.*, Samuel Williston, *A Treatise on the Law of Contracts* § 71:36 (Richard A. Lord, 4th ed. 2003).

[34] *Willig* v. *Rapaport*, 81 A.D.2d 862, 864 (N.Y.A.D. 1981); *see also* 17 N.Y. Jur. Duress and Undue Influence, §§ 18, 19, 21.

[35] 59 C.J.S. Mortgages § 184 (2009) (footnote omitted).

In the present day, however, governments have attempted to replace the warrant process with a system in which the exercise of a constitutional right has become a crime. Any consent that carries penal consequences is no actual consent at all. Left to its own devices, law enforcement would make all refusals to search a type of crime. The claim that such laws are necessary and that the warrant system cannot be utilized, is unsupported by evidence. Rather, to the contrary, available data shows that criminal refusal statutes are an ineffective means of reducing refusals.

If a jurisdiction's outmoded warrant procedures result in habitual delays, then the response should be to update the procedures, rather than to dispense with the protections of the Fourth Amendment by criminalizing the constitutional right of a citizen to demand that a warrant be procured before authorities consents to a search of his body for any evidence of the crime of which he is accused.

CONCLUSION

For the foregoing reasons, this Court should reverse the decisions of the Supreme Courts of the States of Minnesota and North Dakota.

Respectfully submitted,

DONALD J. RAMSELL
COUNSEL FOR NAT'L COL. FOR DUI DEFENSE
RAMSELL & ASSOCIATES, L.L.C.
128 S. County Farm Rd.
Suite F
Wheaton, IL 60187
(630) 665-8780

LEONARD R. STAMM *
COUNSEL FOR NAT'L COL. FOR DUI DEFENSE
GOLDSTEIN & STAMM P.A.
6301 Ivy Lane, Suite 504
Greenbelt, MD 20770
(301) 345-0122
stamm.lenny@gmail.com

JEFFREY T. GREEN
CO-CHAIR, NACDL AMICUS COMMITTEE
1660 L Street, N.W.
Washington, D.C. 20005
(202) 872-8600

Counsel for Amici Curiae

February 11, 2016

* Counsel of Record

APPENDIX

Figure 1. Breath Test Refusal Rates, 2005

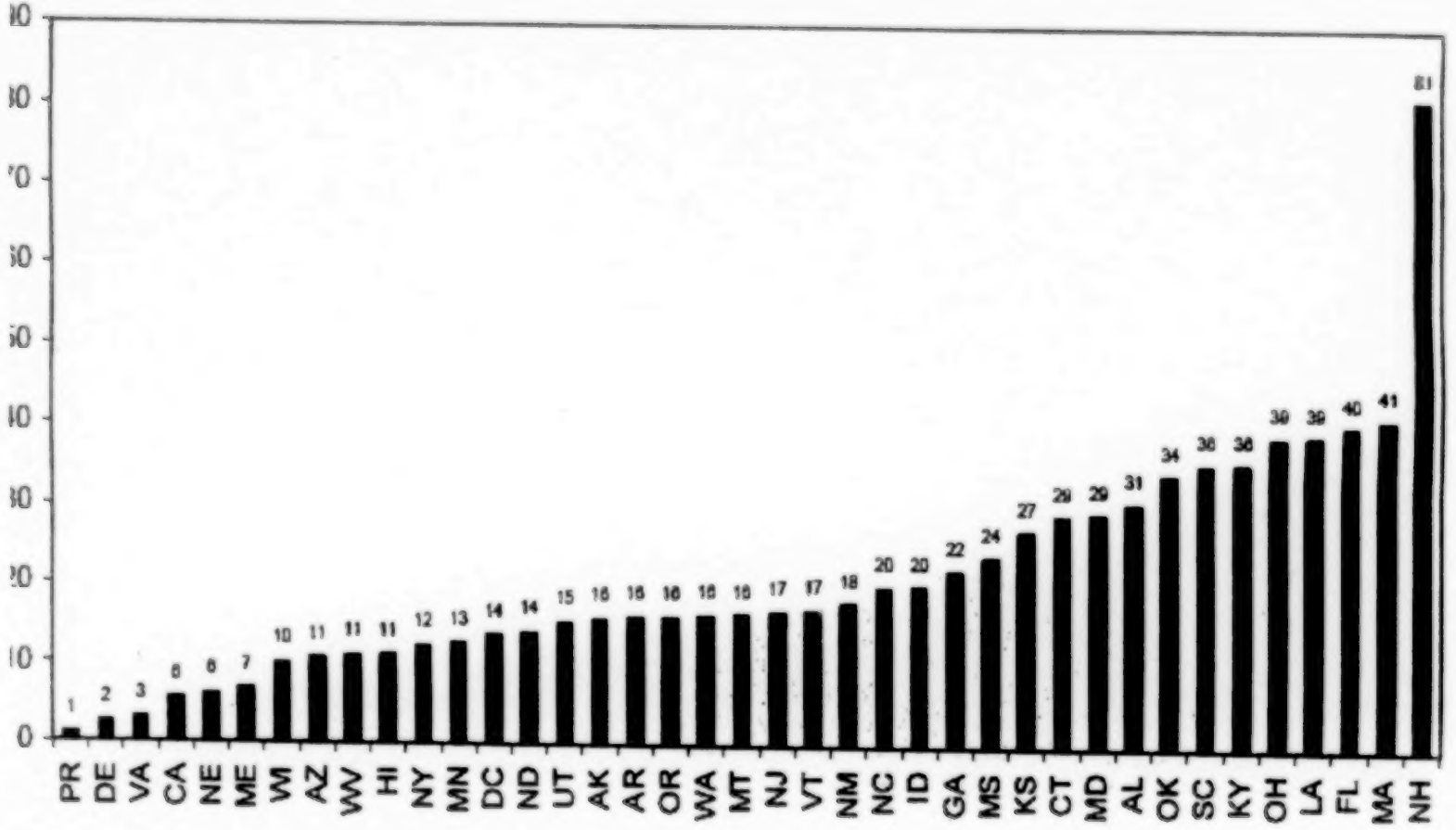


Figure 2. Breath Test Refusal Rates, 2001 and 2005

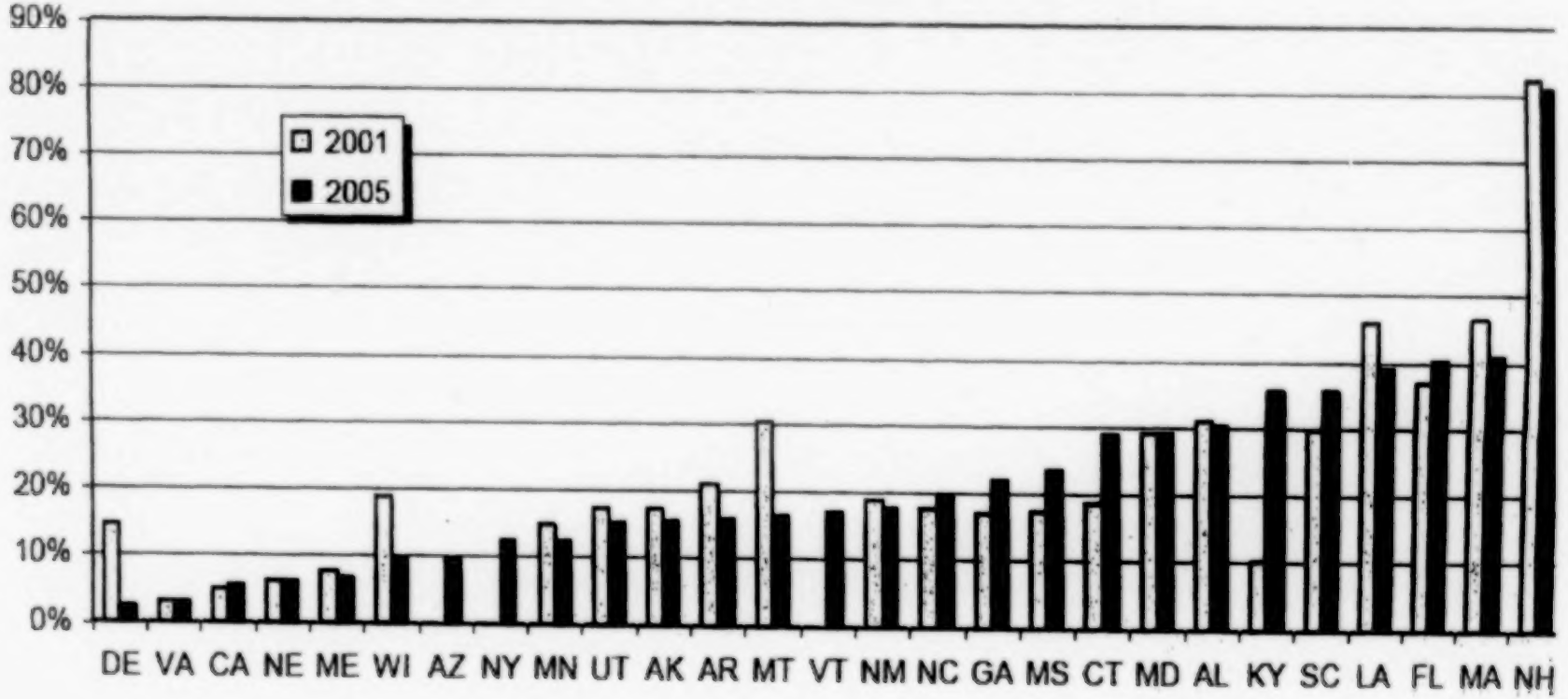
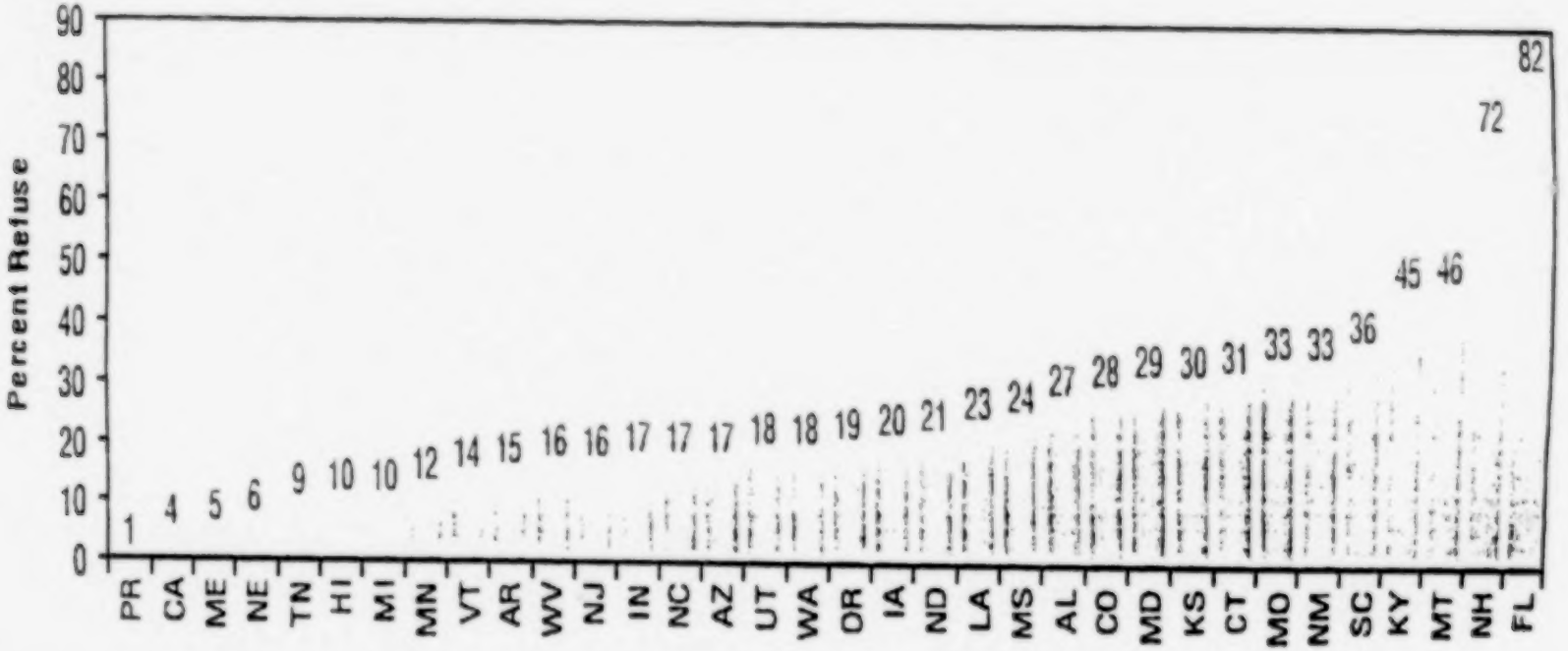
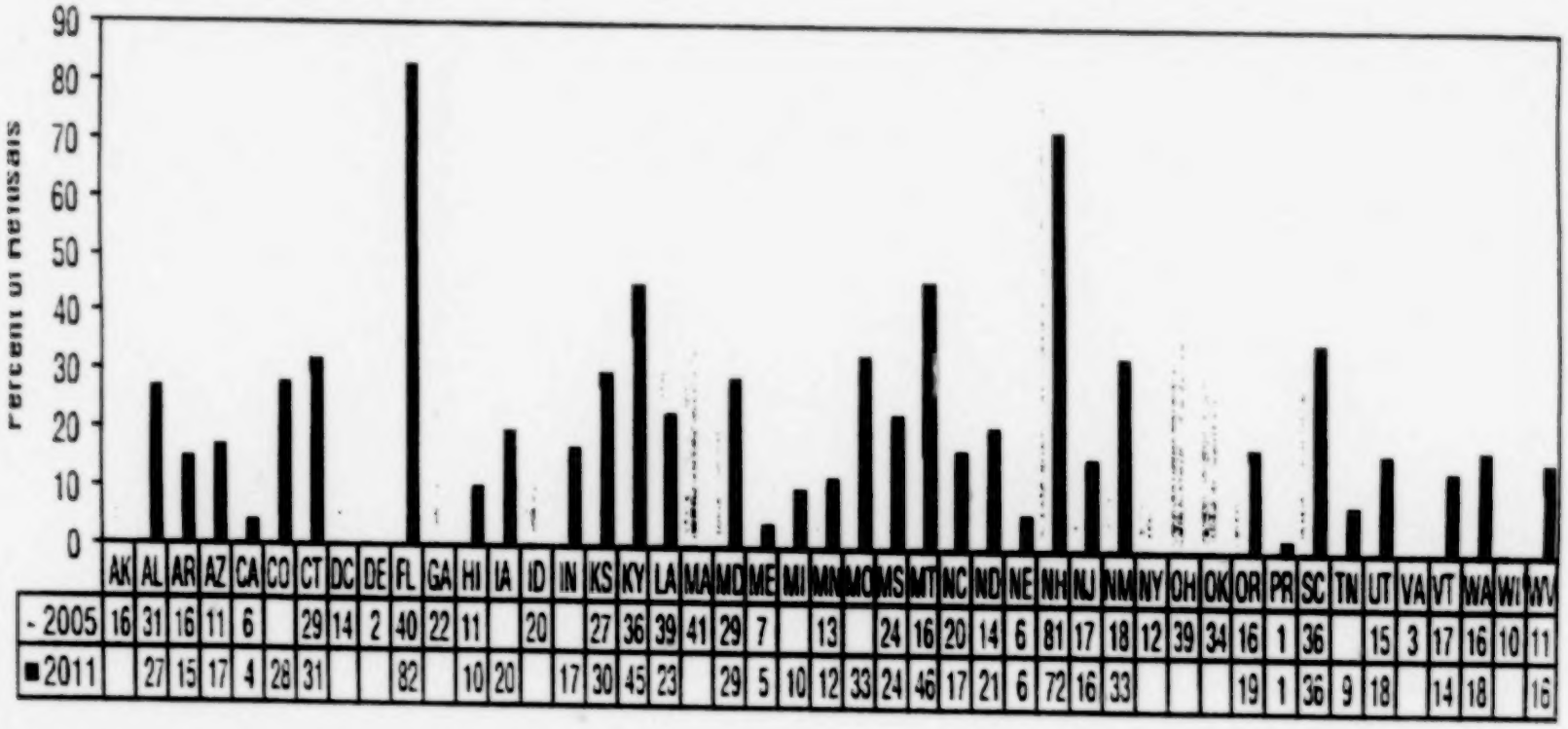


Figure 1
Breath Test Refusal Rates by State, 2011



Note that New Hampshire had 2011 data only from January to September. Therefore, the data are extrapolated based on the average for the 9-month period.

ıparison of BAC Test Refusal Rates in 2005 and 2011



	AK	AL	AR	AZ	CA	CO	CT	DC	DE	FL	GA	HI	IA	ID	IN	KS	KY	LA	MA	MD	ME	MI	MN	MO	MS	MT	NC	ND	NE	NH	NJ	NM	NY	OH	OK	OR	PR	SC	TN	UT	VA	VT	WA	WI	WV
- 2005	16	31	16	11	6		29	14	2	40	22	11		20		27	36	39	41	29	7		13		24	16	20	14	6	81	17	18	12	39	34	16	1	36		15	3	17	16	10	11
■2011		27	15	17	4	28	31			82		10	20		17	30	45	23		29	5	10	12	33	24	46	17	21	6	72	16	33				19	1	36	9	18		14	18		16

'aph includes data from all States that provided data in 2005 and/or 2011.

APPENDIX E

SUPERIOR COURT OF CALIFORNIA
County of Napa

SEARCH WARRANT
Blood Draw
(Veh. Code §§ 23140, 23152, 23153)

Warrant No. SW15-297

The People of the State of California

To Any Peace Officer in Napa County

Name of arrestee: [redacted]

Name of affiant: M. Wilson

Vehicle Code violation: ☒ 23152 ☐ 23153 ☐ 23140

Proof, by affidavit, having been made before me this day by M. Wilson, that there is probable cause for believing that items lawfully seizable pursuant to California Penal Code §1524 in that:

X a sample of the blood of a person constitutes evidence that tends to show a violation of Section 23140, 23152, or 23153 of the Vehicle Code and the person from whom the sample is being sought has refused an officer's request to submit to, or has failed to complete, a blood test as required by Section 23612 of the Vehicle Code, and the sample will be drawn from the person in a reasonable, medically approved manner.

___ the property or things to be seized constitute any evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony.

The affidavit below, which was sworn to and subscribed before me on this date, has established the following:

(1) At the date and time listed in the affidavit, the arrestee was arrested for driving a vehicle in Napa County in violation of Vehicle Code § 23152, and the arrestee remains in custody for this offense.

(2) There was probable cause for the arrest.

(3) There is probable cause to believe that the testing of a sample of arrestee's blood will produce reliable evidence as to arrestee's guilt or innocence.

Pursuant to *Missouri v. McNeely* (2013) __ U.S. __ (133 S. Ct. 1552), and California Penal Code §1524, you are therefore ordered to promptly obtain a sample of the arrestee's blood and submit the sample to an approved laboratory for analysis. The sample shall be obtained in a medically approved manner by personnel who are certified to draw blood. If the arrestee physically resists the execution of this warrant after being notified by an officer that this warrant has been issued, officers may utilize reasonable force to execute this warrant.

Approved by telephone on 10/22/15 at
0210 by Judge Diane Price

DP
Nighttime Service Authorized
(2200-0700) if initialed or signed

10/22/15
Date

DIANE PRICE
Judge of the Superior Court

Confirmed Diane M. Price
10/23/15 1:05pm

AFFIDAVIT

Name of affiant: M. Wilson
Anima's agency: CHP
Name of arrestee: [redacted]
Date of arrest: 10-22-15
Time of arrest: 0028 HRS

I am a law enforcement officer employed by the above agency. On the above date and time I arrested the arrestee for violating Vehicle Code § 23152 and the arrestee has remained in custody. The arrest was based on the following circumstances that were witnessed by me or, where indicated, were witnessed by another officer who informed me of the circumstance:

On 10/22/15 at approx. 0010 hrs my partner, SGT. Duncan, #15139, (driver) and I were traveling on southbound SR-29 n/o First St when my attention was drawn to the subject vehicle (s/v) silver 4 door traveling at a high rate of speed. We were in a fully marked black and white patrol vehicle. I activated the patrol vehicle's front radar and obtained a speed of 74 mph in a posted 60 mph. We positioned the patrol vehicle behind the s/v and initiated an enforcement stop using the patrol vehicles overhead red lights. The s/v yielded at Imola Ave. and e/o Golden Gate Dr. I contacted the driver through the open driver side window. I could smell the odor of an alcoholic beverage coming from the vehicle. He was I.D. by his Oklahoma D.L. and instructed to exit the vehicle, where I could still smell an alcoholic beverage coming from his breath and person. He was give the pre FST question and was unable to perform the FST's as explained and demonstrated and placed under arrest.

Declaration: I declare under penalty of perjury that the foregoing is true.

10/22/15	M. Wilson
Date	Affiant

[redacted] Refusal Warrant Transcription

Judge Price- "I am Napa Superior Court Judge Diane Price. Officer please state your name for the record."

Officer Wilson- "Officer Myron Wilson."

Judge Price- "Alright, Officer Wilson you have emailed to me a search warrant and an affidavit, I see that, um, you have already sign the affidavit but please raise your right hand. Do you swear under penalty of perjury that everything in the affidavit is true and correct?"

Officer Wilson- "Yes I do."

Judge Price- "Ok, and is that your signature on the affidavit?'

Officer Wilson- "Yes Ma'am."

Judge Price- "And, uh. Having read the search warrant and statement of probable cause prepared by Officer Wilson, I find there is probable cause to issue the warrant. And given the present hour I find that there is good cause and I authorize nighttime service of this warrant. Officer you have my permission to affix my signature to this warrant and write on the warrant Approved by telephone on October 22 at 2:10 am by Judge Diane M. Price.

SEARCH WARRANT RETURN
SEARCH WARRANT #SW15-297

SAMPLE OF **WHOLE BLOOD WAS** SEIZED FROM SUBJECT: [redacted]

In the County of Napa, State of California by virtue of a search warrant dated the ____ day of October 22, 2015, and executed by Judge DIANE PRICE, Napa Superior Court County of Napa, State of California:

I, MARC RENSPURGER, the officer by whom this Warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the Warrant.

All of the property taken by virtue of said Warrant will be submitted to the evidence locker at the Napa area CHP office for subsequent forensic testing by California Department of Justice (DOJ), subject to the order of this Court or of any Court in which the offense in respect to which the property or things taken is triable.

/s/ Marc Renspurger
Officer

Subscribed and sworn to before me this 23 day of October 2015

/s/ Diane M. Price
JUDGE OF THE ABOVE ENTITLED COURT

COUNTY OF NAPA

Notice Re: Property Seized Pursuant to Search Warrant

Date Issued: 10/22/15 Date Served: 10/22/15

Warrant No.: _____

Judge DIANE PRICE of the Napa Consolidated Courts, 825 Brown St, Napa, Ca.

YOU ARE HEREBY PUT ON NOTICE THAT the property listed below was seized under the authority a Search Warrant and is now under the jurisdiction of the issuing court. You may seek the return of this property by filing a Motion for Return of Property pursuant to California Penal Code sections 1536 / 1540 with the Clerk of the Consolidated Courts. However, the filing of a Motion for Return of Property will not necessarily result in the property's return. You may wish to consult with an attorney regarding the filing of the motion. You may have other legal remedies. The service of this Notice does not obligate the seizing law enforcement agency to return the property nor is it a relinquishment of any holds that maybe placed by other government agencies.

Item	Description	Item	Description
1	VIAL BLOOD		

Inquires regarding this property should be made to
(Agency Name) CHP

(Peace Officers Name) M. Wilson
(Address) 975 Golden Gate Dr Napa
(Telephone No.) 707-253-4906
(Case No.) CB28284

Notice was given to/left at [redacted]
(Ofc. Initials) Illegible

APPENDIX F

States That Expressly Allow Electronic or Telephonic Submission and Reception of Warrant Applications and/or Search Warrants

Ala. R. Crim. P. 3.8(b)

Alaska Stat. Ann. § 12.35.015

Ariz. Rev. Stat. Ann. §§ 13-3914(C), 13-3915(D), (E)

Ark. Code Ann. § 16-82-201

Cal. Penal Code § 1526(b)

Colo. Rev. Stat. Ann. § 16-1-106(3)(b)

Ga. Code Ann. § 17-5-21.1

Haw. R. Penal P. 41

Idaho Code Ann. §§ 19-4404, 19-4406

Ill. - 725 Ill. Comp. Stat. Ann. 5/108-4(a)

Ind. Code. Ann. § 35-33-5-8

Iowa Code Ann. §§ 808.3, 808.4; Iowa Code Ann. § 321J.10(3) (telephonic testimony communicated only in circumstances involving traffic accidents)

Kan. Stat. Ann. §§ 22-2502(a), 22-2504

Ky. Electronic application and issuance (§ 455.170)

La. Code Crim. Proc. Ann. art. 162.1(B), (D)

Md. Rules Of Criminal Procedure 1 203(a)(2)(iii)(2)

Me. R. Crim. P. 41C

Mich. Comp. Laws Ann. § 780.651(2)-(6)

Minn. R. Crim. P. 36.01, 36.05

Mo. Ann. Stat. § 542.276(3), (7)

Mont. Code Ann. §§ 46-5-221, 46-5-222

Nev. Rev. Stat. Ann. § 179.045(2), (4)

N.C. Gen. Stat. Ann. § 15A-245(a)(3)

N.D. R. Crim. P. 41(c)(2)-(3)

N.H. Rev. Stat. Ann. § 595-A:4-a

N.J. R. Crim. P. 3:5-3(b)

N.M. R. Crim. P. 5-211(F)(3), (G)(3)

N.Y. Crim. Proc. Law §§ 690.36(1), 690.40(3), 690.45(1), (2) (McKinney 2012)

Ohio R. Crim. P. 41(C)(1)-(2)

Okla. Stat. Ann. tit. 22 §§ 1223.1, 1225(B)

Or. Rev. Stat. Ann. § 133.545(5)-(6)

Pa. R. Crim. P. 203(A), (C)

S.D. Codified Laws §§ 23A-35-4.2, 23A-35-5, 23A- 35-6

Tenn. Rules of Criminal Procedure, Rule 41(c)(2)

Utah R. Crim. P. 40(l)

Vt. R. Crim. P. 41(c)(4), (g)(2)

Va. Code Ann. § 19.2-54

Wash. Super. Ct. Crim. R. 2.3(c)

Wis. Stat. Ann. § 968.12(3)

Wyo.: W.S. 31-6-102(d)

APPENDIX G

States That Specify Written or In Person Applications, or Lack Mention of Electronic Submission

Conn. Gen. Stat. Ann. § 54-33a(c)

Del. Code. Ann. tit. 11 §§ 2306, 2307

Fla. Stat. Ann. §§ 933.06, 933.07(1)

Mass. Gen. Laws Ann. ch. 276, § 2b

Miss. Code Ann. § 99-15-11

R.I. Gen. Laws Ann. § 12-5-3

S.C. Code Ann. § 17-13-140

Tex. Code Crim. Proc. Ann. art. 18.01

APPENDIX H

States Actively Using Warrants to Draw Blood in DUI Cases

Alabama

Britton v. *State*, 631 So. 2d 1073 (Ala. Crim. App. 1993); A. R. Crim. P. 16.2(b)(6)

Arizona

Ariz. Rev. Stat. Ann. §§ 13-3915 (D), (E), 28-1321, 28-1388

Georgia

Ga. Code Ann. § 40-5-67.1 (d.1); Rhonda Cook, *DUI Test Refusals Prompt Blood Warrant*, Atlanta J. Const. (Dec. 23, 2011), *available at* http://www.ajc.com/news/news/local/dui-test-refusals-prompt-blood-warrants/nQPnJ/ (last visited Dec. 14, 2012)

Illinois

DuPage County Rolls Out 'No Refusal' Weekend Over Labor Day, Naperville Patch (Aug. 31, 2011), *available at* http://naperville.patch.com/articles/dupage-county-rolls-out-no-refusal-weekend-over-labor-day-2 (last visited Dec. 14, 2012)

Iowa

Iowa Code §§ 321J.10, 321J.10A(1)(c); *State* v. *Harris*, 763 N.W.2d 269 (Iowa 2009); *State* v. *Johnson*, 744 N.W.2d 340 (Iowa 2008)

Kansas

Kan. Stat. Ann. § 8-1001 (p), (t); George Diepenbrock, *With iPads, Judges In Touch Any Time, Any Place*, Lawrence J. World (Feb. 5, 2012), *available at* http://www2.ljworld.com/news/2012/feb/

05/ipads-judges-touch-any-time-any-place/ (last visited Dec. 14, 2012); Gregory T. Benefiel, *DUI Search Warrants: Prosecuting DUI Refusals*, The Kansas Prosecutor, Vol. 9, No. 1 (Spring 2012), *available at* http://www.kcdaa.org/Resources/Documents/KSProsecutor-Spring12.pdf

Louisiana

Mike Steele & Heather Harel, *State Police Say "No Refusal" Weekend Has Been Successful*, wbzr.com (Sept. 6, 2010), *available at* http://www.wbrz.com/news/no-refusal-weekend/ (last visited Dec. 14, 2012); Raymond Legendre & Houma Courier, *No Refusal Weekend For Those Suspected Of DWI Has Critics, Supporters*, wwltv.com eyewitness news (Sept. 10, 2010), *available at* http://www.wwltv.com/news/local/No-Refusal-weekend-for-those-suspected-of-DWI-case-critics- supporters-102228604.html (last visited Dec. 14, 2012)

Michigan

Mich. Comp. Laws § 780.651; *State* v. *Snyder*, 449 N.W.2d 703 (Mich. Ct. App. 1989)

Mississippi

McDuff v. *State*, 763 So.2d 850 (Miss. 2000)

Missouri

State v. *McNeely*, 358 S.W.3d 65, 68 (Mo. 2012); Dana Fields, *Mo. Supreme Court Rejects Warrantless DWI Blood Test*, Associated Press, Jan. 18, 2012, *available at* 1/18/12 AP Alert MO (Westlaw)

Montana

Mont. Code Ann. § 61-8-402; Gwen Florio, *Judges Happily Lose Sleep Over Montana's New DUI Blood-draw Law*, The Missoulian (Dec. 18, 2011), *available at* http://missoulian.com/news/local/judges-happily-lose-sleep-over-montana-s-new-dui-blood/article_2bbe48e0-2922-11e1-917d-001871e3ce6c.html (last visited Dec. 14, 2012)

New Mexico

N.M. Stat. Ann. § 66-8-111; *State* v. *Hughey*, 163 P.3d 470 (N.M. 2007); *State* v. *Silago*, 119 P.3d 181 (N.M. Ct. App. 2005); *State* v. *Montoya*, 114 P.3d 393 (N.M. Ct. App. 2005); *State* v. *Duquette*, 994 P.2d 776 (N.M. Ct. App. 1999)

North Carolina

N.C. Gen. Stat. Ann. § 20- 139.1(b5); Nat'l Highway Safety Transp. Admin., *Use of Warrants to Reduce Breath Test Refusals: Experiences From North Carolina*, DOT HS 811461 (Apr. 2011), *available at* www.nhtsa.gov/staticfiles/nti/pdf/811461.pdf

Ohio

Ohio Rev. Code Ann., § 4511.19(D)(1)(b); Mary Beth Quirk, *Ohio Cops Implementing "No-Refusal" DUI Weekend With Blood-Draw Warrants*, The Consumerist (Feb. 3, 2012), *available at* http://consumerist.com/2012/02/03/ohio-cops-implementing-no-refusal-dui-weekend-with-blood-draw-warrants/ (last visited Dec. 14, 2012); Jennifer Feehan & Erica Blake, *Refusing DUI Test Not Option Wood Co. Authorities Seek Blood Draws If Drivers Object*, The Toledo Blade (Feb. 2, 2012), *available at* http://www.toledoblade.com/Police-

Fire/2012/02/02/Refusing-DUI-test-not-option.html (last visited Dec. 14, 2012)

Oregon

Or. Rev. Stat. 813.320(2)(b); Nat'l High- way Traffic Safety Admin., *Use of Warrants For Breath Test Refusals: Case Studies*, DOT HS 810 852 (Oct. 2007), *available at* http://www.nhtsa.gov/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/810852.pdf

Tennessee

Tenn. Code Ann., § 55-10-406(a)(4)(A); *New DUI Law Leads To 8 Warrants For Blood Tests*, Associated Press, July 10, 2012, available at 7/10/12 AP Alert – TN 19:11:38 (Westlaw); Kevin McKenzie, *'No Refusal' Labor Day Weekend To Combat DUI In Shelby, Tipton Counties*, The Commercial Appeal (Aug. 31, 2012), *available at* www.commercialappeal.com/news/2012/aug/31/no-refusal-labor-day-weekend-to-combat-dui-in/ (last visited Dec. 14, 2012)

Texas

Tex. Transp. Code Ann. § 724.011 et seq.; *Beeman v. State*, 86 S.W.3d 613 (Tex. Crim. App. 2002); Nathan Koppel, *Texas Blood Test Aims At Drunk Drivers*, Wall Street Journal (Dec. 11, 2011), *available at* http://online.wsj.com/article/SB10001424052970204397704577070700748380114.html

Utah

Jason Bergreen, *Utah Cops Praise Electronic Warrant System*, Salt Lake Tribune (Dec. 26, 2008), *available at* http://www.policeone.com/police-products/communications/articles/1769302-Utah-

cops-praise-electronic-warrant-system (last visited Dec. 14, 2012)

Vermont

Vt. Stat. Ann. Tit. 23, § 1202 (f)

Washington

Wash. Rev. Code § 46.20.308(1); *City Of Seattle* v. *St. John*, 215 P.3d 194 (2009); *New Washington Law For DUI Blood Draw*, Associated Press, Aug. 14, 2012, *available at* 8/14/12 AP Alert - WA 17:58:38 (Westlaw)

Wyoming

Wyo. Stat. Ann. § 31-6-102

In The
Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

WILLIAM ROBERT BERNARD, JR.,

Petitioner,

v.

MINNESOTA,

Respondent.

STEVE MICHAEL BEYLUND,

Petitioner,

v.

GRANT LEVI, DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Writs Of Certiorari To The Supreme Courts Of Minnesota And North Dakota

BRIEF OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL TRAFFIC LAW CENTER AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

KAY CHOPARD COHEN
Executive Director
NATIONAL DISTRICT ATTORNEYS ASSOCIATION
99 Canal Center Plaza, Suite 330
Alexandria, VA 22314
(703) 549-9222
kaychopardcohen@ndaa.org

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Interest of *Amicus Curiae*	1
Summary of Argument	2
Argument	4
I. BACKGROUND FACTS	7
II. STATES' POWERS	9
III. CONSTITUTIONAL CONSIDERATIONS	12
A. Fourth Amendment	12
1. Exigency	12
2. Search Incident to Arrest	13
3. Consent	14
4. No Search	16
B. Fifth Amendment	17
Other Considerations	18
Conclusion	19

TABLE OF AUTHORITIES

Page

CASES:

Bernard v. Minnesota, 859 N.W.2d 762 (2015), *cert. granted*, 136 S. Ct. 615 (Dec. 11, 2015) (No. 14-1470) 13

Burnett v. Municipality of Anchorage, 806 F.2d 1447 (9th Cir. 1986) 16

Hiibel v. Sixth Judicial District Court, 542 U.S. 117 (2004) 19

Jensen v. State, 667 P.2d 188 (1983) 10, 19

Kanikaynar v. Sisneros, 190 F.3d 1115 (10th Cir. 1999) 14, 18

Mackey v. Montrym, 443 U.S. 1 (1979) 9, 17

Missouri v. McNeely, 133 S. Ct. 1552 (2013) 6, 13, 15, 16, 19

Schmerber v. California, 384 U.S. 757 (1966) 11, 12, 13, 17

Skinner v. Railway Labor Execs. Ass'n, 489 U.S. 602 (1989) 11

South Dakota v. Neville, 459 U.S. 553 (1983) 9, 17

State v. Birchfield, 858 N.W.2d 302 (2015), *cert. granted*, 136 S. Ct. 614 (Dec. 11, 2015) (No. 14-1468) 11, 12, 16

State v. Murphy, 516 N.W.2d 285 (N.D. 1994) 11

State v. Orr, 335 P.3d 51 (2014) 19

State v. Won, 2015 WL 7574360 (Nov. 25, 2015) 14

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

Minnesota Statutes Annotated §609.50 19

Minnesota Statutes Annotated §169A.20, subd. 2 14

Minnesota Statutes Annotated §169A.51, subd. 1 14

Minnesota Statutes Annotated §169A.51, subd. 2 .....14, 15

North Dakota Century Code Annotated §39-08-01 14

North Dakota Century Code Annotated §39-20-01 .....14, 15

North Dakota Century Code Annotated §39-20-04 15

OTHER SOURCES CITED:

National Highway Traffic Safety Administration, *Traffic Safety Facts, 2014 Data* (DOT HS 812 231), December 2015.....4

Implied Consent: No Exception to the Warrant Requirement, Between the Lines (National Traffic Law Center, Alexandria, VA), Vol. 23, No.1.....14

Kathryn E. Wilhelm, Note, *Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel*, 90 BU 6 (2010).....10

INTEREST OF *AMICUS CURIAE*[1]

The National District Attorneys Association (NDAA) was formed in 1950 and is the oldest and largest organization representing America's state and local prosecutors. NDAA gives a focal point to local prosecutors to advance their causes and issues at the national level. The association presently has approximately 10,000 members, including most of the nation's local prosecutors, in addition to assistant prosecutors, investigators, victim-witness advocates and paralegals. NDAA's members come from the offices of District Attorneys, State's Attorneys, Attorneys General and county and city prosecutors with responsibility for prosecuting criminal violations in every State and territory in the United States. NDAA representatives regularly meet with the Department of Justice, members of Congress and other national associations to represent the views of prosecutors to influence federal and national policies and programs that affect law enforcement and prosecution. In carrying out its mission, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people," NDAA provides professional guidance and support to its members, serves as a resource and education center, and follows

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

public policy issues involving criminal justice and law enforcement.

The National Traffic Law Center (NTLC) is part of NDAA and serves as a nationwide, interdisciplinary resource center for technical assistance, training and publications. It was created in cooperation with the National Highway Traffic Safety Administration (NHTSA) and currently operates under funding received from both NHTSA and the Federal Motor Carrier Safety Administration, both agencies of the United States Department of Transportation.

Because state and local prosecutors handle 95% of the criminal prosecutions nationally, rulings by the Supreme Court have far-reaching, serious impacts upon criminal cases in state courthouses across the country. We practice where the law is truly tested: not in the deliberative atmosphere of an appellate courtroom, but on the streets where police must make split-second choices in dangerous situations and in trial court settings that sometimes give prosecutors and police only a moment to analyze and react. It is important to the National District Attorneys Association, and to the tens of thousands of prosecutors we represent, that the U.S. Supreme Court will be well-advised of the practical applications of the laws it creates.

Every year, impaired drivers are responsible for killing thousands of innocent people on America's highways. Close to 1.5 million impaired driving arrests are made annually, comprising more than ten

percent of the total number of arrests made each year. Impaired driving prosecutions are some of the most highly litigated and contested cases within the criminal justice system.

Given the need for its member prosecutors and law enforcement professionals to preserve all reasonable tools at their disposal to combat the scourge of impaired driving, the *Amicus* respectfully submits this Brief in support of Respondents North Dakota and Minnesota.

SUMMARY OF ARGUMENT

Impaired driving kills and injures thousands of people every year and costs billions of dollars, beyond the loss of human life.

Driving on a public highway is a privilege, not a right. Such privilege is properly conditioned on a driver's agreement to submit to a chemical test to determine the alcohol content of his blood when probable cause exists that he is driving while impaired. While the Constitution protects citizens from unreasonable searches, exceptions exist that may make a warrantless search reasonable and this type of implied consent is such a valid exception. Further, in the situation where probable cause exists that a driver is impaired, it is reasonable to attach a criminal penalty to the withdrawal of a driver's consent to submit to such testing. Criminalizing such behavior (*i.e.*, the withdrawal of consent), is within a states'

reserve powers and is a reasonable exercise of police powers. To require a search warrant in this circumstance does not guarantee that the suspect will cooperate with the blood draw and, thus, force may be necessary to affect the search. Allowing a state to criminalize refusal to submit to a chemical test eliminates unnecessary, and potentially dangerous, forced blood draws. Lastly, upholding criminal refusals is an effective and legal "tool" prosecutors have to enforce impaired driving laws.

ARGUMENT

Thousands of people are injured and killed every year as a result of impaired driving. Despite elevated public awareness of its danger, the number of people who commit this preventable crime continues to rise. In 2014, the last year for which national statistics are available, nearly 10,000 people died in alcohol-impaired driving crashes – the equivalent of one person every 53 minutes. National Highway Traffic Safety Administration, *Traffic Safety Facts, 2014 Data* (DOT HS 812 231), December 2015. In addition to the cost to human life, alcohol-impaired motor vehicle crashes cost more than an estimated $44 billion annually, including costs for lost productivity,

workplace losses, legal and court expenses, medical costs, property damage and other costs. *Id.*[2]

As a result, in an effort to make public roadways safer, states have increased the consequences for those who drive while impaired. For example, some states have established mandatory minimum sentences for drivers convicted of driving with a high blood alcohol level and/or with the presence of certain drugs in their blood.[3] Another example of the negative consequences faced by the impaired driver is licensing sanctions; virtually every state administratively suspends or revokes the driver's license of an impaired driver who refuses to submit to chemical testing when probable cause exists that he was impaired. An overwhelming majority of states also permit evidence of a suspect's refusal to submit to a chemical test to be admissible in a criminal trial. Some states have gone further and criminalized the

---

[2] These figures are the most recently available statistics and are from 2010.

[3] 47 states and the District of Columbia currently have some sort of enhanced blood alcohol content (BAC) legislation. Many of these states define excessive BAC differently. Some enhance criminal penalties while others are only related to the civil administrative license revocation. Enhanced BAC levels range from .10 grams of alcohol per 100 grams of blood (Iowa, New Jersey, and South Carolina) to .20 and .25 grams of alcohol per 100 grams of blood (Wisconsin and the District of Columbia).

act of refusing to submit to chemical testing after an officer has probable cause to arrest for DUI.[4]

This Court should decide affirmatively that a state may, in fact, make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol and/or drugs when probable cause exists to believe he is driving while impaired. Criminalizing refusals is a "tool" prosecutors and police may use to enforce impaired driving laws. The refusal statutes at issue in these consolidated cases existed when the Court decided *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). Additionally, they do not affect the rights of suspects to travel. The Supreme Court should decide that a state may criminalize a suspect's refusal because it is within the reserved powers of the state legislatures, is a reasonable exercise of police powers under the circumstances, and does not unreasonably infringe on a driver's rights. Moreover, if the Court requires an officer to secure a search warrant to obtain blood, that would not guarantee a suspect will cooperate with a blood draw, does not make the search any more reasonable, and may not always be possible. To prohibit states from criminalizing refusals would encourage nonconsensual, forced blood draws on impaired drivers, needlessly expose police officers and medical personnel to the violent or dangerous behavior of impaired drivers who do not wish

---

[4] Alaska, California, Indiana, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, Nevada, Rhode Island, Tennessee, Ohio, Virginia, and Vermont.

to be tested, and may unnecessarily subject the police and medical staff to civil liability. In addition, since the entire legal system is based on resolving disputes in court and not on the street, the proper forum to challenge the reasonableness of a search (or the lack thereof) is the courtroom. For the following reasons, the U.S. Supreme Court should hold that a state may make it a crime for a suspect to refuse to take a chemical test to detect the presence of alcohol and/or drugs in his blood when probable cause exists that he was driving while impaired.

I. BACKGROUND FACTS

In each of the three cases before the Court, the defendant was arrested for impaired driving. Each defendant was provided the implied consent advisory by a police officer.

- Birchfield submitted to a preliminary breath test with a .254 percent alcohol concentration but refused to consent to a chemical test. He later conditionally pled guilty to misdemeanor refusal to submit to a chemical test, reserving his right to appeal the court's denial of his motion to dismiss the charge on constitutional grounds. The North Dakota Supreme Court held that the criminal refusal statute did not violate the Fourth Amendment or the search and seizure provision of the North Dakota Constitution either facially or as applied to Birchfield.

- Beylund agreed to submit to a blood test, the results of which were .25 grams of alcohol per 100 ml of blood. As a result of Beylund's alcohol level, his driver's license was subsequently suspended. He petitioned for reconsideration of the hearing officer's decision to suspend the license arguing that the blood test was an unconstitutional warrantless search and without a valid exception.

- Bernard refused to submit to a chemical test. Bernard was charged with a refusal offense and filed a motion to dismiss, arguing the statute violated due process because the statute makes it a crime to refuse an unreasonable, warrantless search of a driver's breath. The lower court ruled the refusal statute was not on its face unconstitutional but dismissed Bernard's case because the police lacked a lawful basis to search him without a warrant (*i.e.*, that police lacked a legal reason to arrest him for impaired driving). The court of appeals reversed, holding that Bernard's due process rights were not violated by prosecuting him for refusal because the facts of his case established the police officers had probable cause and could have secured a search warrant to conduct a blood draw. The Minnesota Supreme Court held that the search was valid under the search incident to arrest exception to the warrant requirement and

that the refusal statute is a reasonable means to a permissive objective.

II. STATES' POWERS

The U.S. Supreme Court has recognized the power of states to enact laws to aid the police function of protecting the safety of its people. *Mackey v. Montrym*, 443 U.S. 1, 17 (1979); *South Dakota v. Neville*, 459 U.S. 553 (1983). The Court has also recognized society's problem with impaired driving and that it occurs with "tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation. . . . This Court, although not having the daily contact with the problem state courts have, has repeatedly lamented the tragedy." *Neville* at 558. In fact, the Court has "traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety. States surely have at least as much interest in removing drunken drivers from their highways as in summarily seizing mislabeled drugs or destroying spoiled foodstuffs." *Montrym* at 17-18. States "must have the authority, if it is to protect people from drunken drivers, to require that the breath-analysis test record the alcoholic content of the bloodstream at the earliest possible moment." *Montrym* at 15.

States have the power to enact laws to protect public health and safety and have considerable interest in promoting and maintaining safe roadways,

especially from the dangers of impaired drivers. States, therefore, may highly regulate the privilege to drive. While vehicles may be safely operated in the ordinary course, when operated recklessly or by an impaired driver, they become lethal weapons. It is reasonable for a legislature to determine that chemical testing of an impaired driver would be helpful to the identification and successful prosecution of him, and that a refusal to submit to testing impedes this objective. Penalizing a refusal, therefore, " . . . serves the legitimate legislative goals of deterring such refusals and ensuring that those who refuse gain no benefit by their refusal." *Jensen v. State*, 667 P.2d 188 (1983).

Under the U.S. Constitution, there is a fundamental right to "liberty," which includes the freedom of movement and interstate travel. *See* Kathryn E. Wilhelm, Note, *Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel*, 90 BU 6 (2010). Each state, however, may regulate the manner and method of travel on the public roadways. There is no constitutional right to drive, only a privilege bestowed by a state. As a prerequisite to the privilege to drive, every state has enacted an implied consent law which, in essence, conditions an individual's privilege to drive on the fact he has agreed to (*i.e.*, impliedly consented to) submit to chemical testing if and when a police officer has probable cause to believe the driver is impaired by alcohol or drugs.

In the past, the Court has declined to recognize a constitutional right to refuse to take a chemical test. *Schmerber v. California*, 384 U.S. 757 (1966); *see also Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602 (1989) (finding that no Fourth Amendment violation existed when drug testing railroad employees who violated safety regulations or were involved in accidents). The North Dakota Supreme Court also observed that before the criminal refusal statute was enacted, there was "no Federal constitutional right to be entirely free of intoxication tests . . ," and that there existed only a conditional right to refuse, based on the licensing consequences for a refusal. *State v. Birchfield*, 858 N.W.2d 302, 304-305 (2015) citing *State v. Murphy*, 516 N.W.2d 285, (N.D. 1994). It logically follows that states would condition an individual's privilege to drive upon his agreement to submit to chemical testing if probable cause exists to believe he is driving while impaired. It is also rational to sanction a suspect who later withdraws his consent, or reneges on the agreement, to submit to testing. To refuse testing prevents the state from obtaining evidence to later be used against the driver in a criminal prosecution for impaired driving. Rather than allow the suspect to benefit from that refusal, holding him criminally accountable serves a legitimate state interest in keeping dangerous drivers off the public roads.[5]

---

[5] The legislature created a statutory right to refuse but attached significant consequences to it so that a driver " may

(Continued on following page)

III. CONSTITUTIONAL CONSIDERATIONS

A. Fourth Amendment

The Fourth Amendment guarantees the right of people to be free from unreasonable searches. The law requires police to have a warrant to conduct a search unless a valid exception exists. For example, exigent circumstances, search incident to arrest, and consent are three acceptable exceptions.

1. Exigency

The Supreme Court held in *Schmerber v. California* that a warrantless, non-consensual test of an impaired driver's blood did not violate the Fourth Amendment against unreasonable searches. The officer in *Schmerber* " . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence,' . ." *Schmerber* at 770. In other words, the natural dissipation of alcohol from the body created an exigency found acceptable by the *Schmerber* Court.

---

not avoid the potential consequences of test submission and gain advantage by simply refusing the test." *Birchfield* at 309, citations omitted. In *Birchfield*, the driver submitted to a PBT with a high result; by refusing further testing, while subject to penalty for the refusal, he " was able to avoid the enhanced penalties for being highly intoxicated." *Birchfield* at 309.

That same exigency, however, was not found in *Missouri v. McNeely*. Factually similar to *Schmerber*, the *McNeely* Court refused to establish a bright line of exigency in all cases based upon the natural dissipation of alcohol in the body. Instead, the *McNeely* Court established a totality of the circumstances test to determine the case-by-case appropriateness of a warrantless search of an impaired driver's blood. Importantly, the *McNeely* Court did not reverse *Schmerber*.

2. Search Incident to Arrest

While the Minnesota Court of Appeals decided that the police could have obtained a search warrant for Bernard (*i.e.*, the police had probable cause), the Minnesota Supreme Court refused to recognize a probable cause exception to the warrant requirement and rejected that rule. *Bernard v. Minnesota*, 859 N.W.2d 762, 766 (2015). Instead, relying on numerous other cases in which warrantless searches of the body were upheld, the Minnesota Supreme Court accepted the argument that it would have been appropriate to search Bernard pursuant to the search incident to arrest exception. As described above, the Minnesota Supreme Court validated the state's ability to take a driver's breath sample as a warrantless search because the search did not violate the Fourth Amendment requirement for a warrant.

3. Consent

Consent is another valid exception to the warrant requirement. As described above, as part of its impaired driving deterrence, every state has an implied consent law. Some courts have not taken the position that implied consent is a valid "per se" exception to the warrant requirement. *Implied Consent: No Exception to the Warrant Requirement*, Between the Lines (National Traffic Law Center, Alexandria, VA), Vol. 23, No. 1. At least one state has determined that in order for consent to be valid, a driver must have the ability to ultimately refuse when requested to submit to a chemical test. *State v. Won*, 2015 WL 7574360 (Nov. 25, 2015). In other words, without the ability to refuse, some states have deemed such consent to be coerced and disallowed the use at trial of subsequent test results, while in other jurisdictions, even the failure to provide proper notice of the consequences of a refusal did not violate due process. *Kanikaynar v. Sisneros*, 190 F.3d 1115 (10th Cir. 1999).

Like many states' implied consent laws, North Dakota's and Minnesota's implied consent laws provide an individual who drives a vehicle is deemed to have given consent to submit to a chemical test after being placed under arrest for driving under the influence. North Dakota Century Code Annotated (NDCC) §39-20-01; Minnesota Statutes Annotated (MSA) §169A.51, subd. 1. Both states also make it a crime to refuse to submit to chemical testing after an arrest for impaired driving. NDCC §39-08-01; MSA §169A.20, subd. 2 and MSA §169A.51, subd. 2. A

police officer is required to advise an individual of the consequences of his refusal to submit to testing. NDCC §39-20-01(3)(a); MSA §169A.51, subd. 2. If a person refuses to submit to testing, however, no test may be given in North Dakota, while a test may still be performed in Minnesota. NDCC §39-20-04; MSA §169A.51, subd. 2. In North Dakota, if an officer has reasonable grounds to arrest a driver, the driver submits to a chemical test, and the results show the driver to have an alcohol concentration in his blood of at least .08% by weight at the time of testing, his license shall be suspended. NDCC §39-20-04.1.

Implied consent laws essentially condition a driver's privilege to drive on the fact he has impliedly consented to submit to chemical testing, if and when a police officer has probable cause to believe the driver is impaired by alcohol or drugs. In fact, the Supreme Court explicitly recognized the benefits of these types of laws in *McNeely*. Specifically, the *McNeely* Court indicated, "[s]tates have a broad range of legal tools to enforce their drunk-driving laws to secure BAC [(blood alcohol concentration)] evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. [Citations omitted.] Such laws impose significant consequences when a motorist withdraws consent. . " *McNeely* at 1566. Although the *McNeely*

Court identified a driver's license suspension or revocation and the use of the refusal in a subsequent prosecution as "significant consequences" the list of consequences was clearly not exhaustive, and presumably, includes within the "broad range of legal tools," the criminal sanctions for refusing to submit to testing. *McNeely* at 1566.

4. No Search

This Court could resolve the entire constitutional issue of whether a refusal statute violates a driver's Fourth Amendment rights by simply finding that no search occurred. When a driver refuses to be tested, and there is no test administered, then it follows that no search occurred about which the parties need to litigate.[6] Likewise, the Court should focus attention on the constitutionality of the arrest, rather than the imagined unconstitutionality of a non-existent search.[7]

---

[6] As the North Dakota Supreme Court recognized in *Birchfield*, that because the driver refused to be tested, as was his right under the statute, and was therefore not tested, no search occurred and no Fourth Amendment violation. *See State v. Birchfield* at 307-308.

[7] In any event, any challenges to the search should be litigated in court. The North Dakota Supreme Court in *Birchfield* quotes from *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1451 (9th Cir. 1986), in which the Ninth Circuit Court of Appeals upheld Alaska's criminal refusal statute against a Fourth Amendment challenge: The driver's " basic argument is that they have been deprived of their right to be free of unreasonable searches. Nothing in the Alaska statutes here at

(Continued on following page)

B. Fifth Amendment

A suspect's due process rights are also not violated by criminalizing refusal. On more than one occasion, the Supreme Court has found no due process violation when, upon a suspect's refusal to submit to testing, a state suspends a suspect's driver's license prior to holding an evidentiary hearing. *Mackey v. Montrym*, 443 U.S. 1 (1979). Additionally, the Supreme Court has allowed states to force defendants to submit to blood-alcohol tests without violating constitutional rights against self-incrimination. *South Dakota v. Neville*, 459 U.S. 553 (1983) and *Schmerber v. California*, 384 U.S. 757 (1966). As mentioned above, some jurisdictions have found no due process violation even when a police officer fails to provide to a suspect notice of the consequences of his refusal.

---

issue deprives them of that right, or otherwise burdens it. A motorist who is stopped DWI and who wishes to vindicate himself has two choices under the law. He may take the test as the state prefers him to do. If he does, and the evidence obtained is favorable to him, he will gain his prompt release with no charge being made for drunk driving. *See Mackey v. Montrym*, 443 U.S. [1, 19, 99 S. Ct. 2612, 61 L.Ed.2d 321 (1979)]. If the evidence is unfavorable, he may challenge the government's use of that evidence by attacking the validity of the arrest. If he does not take the test, he can still challenge the evidence of his refusal by once again attacking the validity of the arrest. Either way, he remains fully capable of asserting the only Fourth Amendment right he possesses: the right to avoid arrest on less than probable cause. Thus, no improper condition has been placed on the exercise of [the driver's] rights under the Fourth Amendment."

Kanikaynar v. Sisneros, 190 F.3d 1115 (10th Cir. 1999).

Other Considerations

If the Court holds that the criminalization of a refusal is unconstitutional, it will likely result in the increase in the number of non-consensual chemical tests, even when an officer obtains a warrant. Increasing the number of non-consensual chemical tests is not the best way to handle refusals and there are other policy reasons why such laws are reasonable. Allowing a driver to refuse to submit to chemical testing may be reasonable but providing consequences for that refusal is also reasonable. Allowing the refusal, and the logical consequences that follow, avoids the volatility of a nonconsensual blood draw which is likely to happen when a warrant is required and the choice to submit to a test is taken away from the suspect. Rather, pursuant to a warrant, the suspect would then be required to provide a blood sample.

There are other justifications supporting arguments for the appropriateness or reasonableness of the criminal refusal statute. One example supporting criminal refusals is based on a destruction of evidence theory. In this regard, a search incident to arrest justifies the warrantless search of an impaired driver in order to avoid the destruction of critical blood-alcohol evidence that supports the impaired driving

charge.[8] Similarly, criminalization of refusal could legitimately be akin to impeding an investigation or concealing evidence. *Jensen v. State*, 667 P.2d 188 (1983). Likewise, it can be analogized that a refusal crime is similar to a crime of obstruction of justice. For example, Minnesota provides for an offense of obstructing legal process when the refusal is also accompanied by actual or threatened force or violence. MSA §609.50. In another jurisdiction, a defendant's refusal to participate in field sobriety tests was enough to support a separate offense of obstruction of justice. *State v. Orr*, 335 P.3d 51 (2014). Lastly, the Court could find that refusing to submit to chemical testing is similar to other "failure to act" crimes. For instance, in one jurisdiction, the crime of failing to identify oneself to the police during a *Terry* stop did not violate the guarantees of the Fourth Amendment. *Hiibel v. Sixth Judicial District Court*, 542 U.S. 117 (2004).

CONCLUSION

With these three consolidated cases, the Supreme Court has the opportunity to provide prosecutors and law enforcement with needed guidance on whether a state may, in the absence of a warrant, criminalize a

[8] Stated differently, the destruction of evidence is an exigent circumstance that would justify a warrantless search. This theory served as the basis for the justification supporting exigency by four Justices in *McNeely*.

driver's refusal to submit to chemical testing when probable cause exists that he is driving while impaired. Refusal laws are no different from other criminal laws created within the purview of the states' legislative power. When the state's interest in keeping public roads safe from impaired drivers is balanced against the privacy interests of the driver, the Court's analysis should recognize the value of implied consent laws and affirm the legitimacy of this legal tool. Invalidating refusal laws would be tantamount to requiring a warrant in every impaired driving case which would be unnecessary and burdensome. Subjecting a driver to a search to determine BAC when probable cause exists that he is driving while impaired is reasonable. Allowing the driver the option to choose his consequence when faced with the offer to submit to chemical testing minimizes the more invasive nonconsensual blood tests.

Respectfully submitted,

KAY CHOPARD COHEN
Executive Director
NATIONAL DISTRICT ATTORNEYS ASSOCIATION
99 Canal Center Plaza, Suite 330
Alexandria, VA 22314
(703) 549-9222
kaychopardcohen@ndaa.org

Nos. 14-1468, 14-1470, 14-1507

In the Supreme Court of the United States

DANNY BIRCHFIELD, *Petitioner*,
v.
NORTH DAKOTA, *Respondent*.

WILLIAM ROBERT BERNARD, JR., *Petitioner*,
v.
MINNESOTA, *Respondent*.

STEVE MICHAEL BEYLUND, *Petitioner*,
v.
GRANT LEVI, DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,
Respondent.

On Writs of Certiorari to the Supreme Courts of Minnesota and North Dakota

BRIEF OF NEW JERSEY AND SEVENTEEN OTHER STATES AS *AMICI CURIAE* SUPPORTING RESPONDENTS

ROBERT LOUGY
Acting Attorney General of New Jersey
Division of Criminal Justice
Hughes Justice Complex
PO Box 086
Trenton, New Jersey 08625
(609) 292-9086

JENNIFER E. KMIECIAK
Deputy Attorney General
Counsel of Record
kmieciakj@njdcj.org

CLAUDIA JOY DEMITRO
GARIMA JOSHI
IAN C. KENNEDY
LILA B. LEONARD
Deputy Attorneys General

Counsel for *Amici Curiae*
[Additional counsel listed with signature block]

QUESTIONS PRESENTED

1. Whether, in the absence of a warrant, a State may make it a crime for a driver to withdraw his implied consent to take a chemical test to detect the presence of alcohol in the driver's body after the driver has been arrested or otherwise detained on suspicion of impaired driving.

2. Whether consent to submit to a chemical test is valid for Fourth Amendment purposes when the State obtains consent after informing the person that, under its implied-consent law, the withdrawal of consent is a crime.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF AMICI INTEREST 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. **States may make it a crime for a driver to withdraw his implied consent to take a chemical test to detect the presence of alcohol in the driver's body after he has been arrested or otherwise detained on suspicion of impaired driving** 3

A. **Petitioners' overly broad reading of *Missouri v. McNeely* is misplaced** 3

B. **Implied-consent and test-refusal laws strike a reasonable balance between the States' compelling interest in eradicating the scourge of impaired driving and the individual privacy rights of drivers** 6

1. **The government interest is immense** 7

2. **Implied-consent laws directly and effectively serve that governmental interest** 8

3. **The intrusion on privacy is minimal** 9

4. **The sanctions States impose for withdrawing implied consent — including criminal penalties — are reasonable and proportionate** 12

II. **A driver's decision to consent to a chemical test is not coerced by the penalties attached to a refusal** 14

CONCLUSION 17

INDEX TO APPENDIX

Nationwide Survey of Implied-Consent and Refusal Laws 1a-34a

TABLE OF AUTHORITIES

Page

Cases:

Brewer v. Motor Vehicle Div., 720 P.2d 564 (Colo. 1986) 16

Bumper v. North Carolina, 391 U.S. 543 (1986) 15

California v. Carney, 471 U.S. 386 (1985) 10

Camara v. Mun. Court of San Francisco, 387 U.S. 523 (1967) 10

Elonis v. United States, 135 S. Ct. 2001 (2015) . 16

Gerstein v. Pugh, 420 U.S. 103 (1975) 11

Illinois v. Lafayette, 462 U.S. 640 (1983) 11

Mackey v. Montrym, 443 U.S. 1 (1979) 1,2 4,9

Maryland v. King, 133 S. Ct. 1958 (2013) 7,9 11

Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) 1

Missouri v. McNeely, 133 S. Ct. 1552 (2013) ..... *passim*

People v. Harris, 184 Cal. Rptr. 3d 198 (Cal. Ct. App. 2015) 14,15

People v. Harris, 170 Cal. Rptr. 3d 729 (2014) 12

Samson v. California, 547 U.S. 843 (2006) 7

Schmerber v. California, 384 U.S. 757 (1966) 4

Skinner v. Ry. Labor. Execs.' Ass'n, 489 U.S. 602 (1989) 6,9

South Dakota v. Neville, 459 U.S. 553 (1983) ..... *passim*

State v. Brooks, 838 N.W.2d 563 (Minn. 2013) 15

State v. Moore, 318 P.3d 1133 (Or. 2013) 15

State v. O'Driscoll, 73 A.3d 496 (N.J. 2013) 16

State v. Tischio, 527 A.2d 388 (N.J. 1987) 1

Terry v. Ohio, 392 U.S. 1, 26 (1968) 11

United States v. Robinson, 414 U.S. 218 (1973) 11

Williams v. State, 167 So. 3d 483 (Fla. Dist. Ct. App. 2015) 10

Other Sources Cited:

Nat'l Highway Traffic Safety Admin., *Traffic Safety Facts, Results of the 2013-2014 National Roadside Survey of Alcohol and Drug Use by Drivers* (February 2015), http://www.nhtsa.gov/staticfiles/nti/pdf/812118-Roadside_Survey_2014.pdf 8

Nat'l Highway Traffic Safety Admin., *Press Release: NHTSA Releases Two New Studies on Impaired Driving on U.S. Roads* (February 26, 2015), http://www.nhtsa.gov/About+NHTSA/Press+Releases/2015/nhtsa-releases-2-impaired-driving-studies-02-2015 8

Nat'l Highway Traffic Safety Admin., *Traffic Safety Facts, Alcohol-Impaired Driving* (2014), http://www-nrd.nhtsa.dot.gov/Pubs/812231.pdf 7

Nat'l Highway Traffic Safety Admin., *Refusal of Intoxication Testing: A Report to Congress* (2008), http://www.nhtsa.gov/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/811098.pdf 13

STATEMENT OF AMICI INTEREST

The Amici States have a paramount interest in enforcing their impaired-driving laws and effectively prosecuting those who commit the crime of driving while intoxicated. "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roadways are legion." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990). Indeed, intoxicated drivers have been described as "moving time bombs." *State v. Tischio*, 527 A.2d 388, 396 (N.J. 1987).

The questions presented in these consolidated cases concern the constitutionality of implied-consent and test-refusal laws, which are critical to the States' ability to eradicate the frightful "carnage" caused by impaired drivers with "tragic frequency" across the country. *South Dakota v. Neville*, 459 U.S. 553, 558 (1983). This Court has recognized that these laws promote public safety by (1) serving as a deterrent to drunk driving; (2) providing "strong inducement" for suspected drunk drivers to take chemical tests in order to obtain reliable evidence in subsequent criminal proceedings; and (3) promptly removing drunk drivers from our roadways. *See Mackey v. Montrym*, 443 U.S. 1, 18 (1979). Given the importance of implied-consent and test-refusal laws in promoting public safety on our roadways, the Amici States respectfully submit this brief in support of Respondents North Dakota and Minnesota.

SUMMARY OF ARGUMENT

A driver on a public roadway suspected of impaired driving has no constitutional right to refuse to submit to chemical testing to detect alcohol or drugs in the body, and the States can thus lawfully impose punishment for refusal to comply with their implied-consent laws. Implied-consent and test-refusal laws have long existed throughout the country and have withstood various constitutional challenges. *See, e.g.*,

Mackey v. Montrym, 443 U.S. 1 (1979); *South Dakota v. Neville*, 459 U.S. 553 (1983). Petitioners now contend, based on an overly broad reading of this Court's decision in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), that these laws can no longer co-exist with the Fourth Amendment.

But *McNeely* itself undercuts Petitioners' arguments. *McNeely* considered *only* the narrow question of whether the natural dissipation of alcohol in the bloodstream constitutes a *per se* exigency such that a warrant would never be required for a nonconsensual blood draw in a drunk-driving case. That is a far different question than whether States can condition the privilege of driving on implied consent to chemical testing when a driver is suspected of impaired driving. In fact, a plurality of this Court favorably cited implied-consent laws as a tool the States have to enforce their drunk-driving laws without resorting to nonconsensual blood draws in every case.

Implied-consent laws across the country strike a reasonable balance between the compelling governmental interest in eradicating the scourge of impaired driving and the individual privacy rights of drivers. They do not authorize suspicionless testing of every driver, and the vast majority of States have imposed significant limitations on when a test can be administered despite a suspect's refusal. But for implied-consent laws to be effective at deterring and punishing impaired driving, there must be consequences for a refusal to comply. Nationwide, those consequence range from license suspensions and fines to possible jail time. All of these consequences are eminently reasonable given the public-safety interests at stake.

Certainly, it is not coercive to inform a driver suspected of impaired driving of those lawful consequences. While the choice of whether to submit

to chemical testing or refuse may not be an easy one, this Court has recognized that the criminal process often requires suspects to make difficult choices. Properly and accurately advising a suspect of the applicable law promotes a knowing and voluntary choice.

ARGUMENT

I. States may make it a crime for a driver to withdraw his implied consent to take a chemical test to detect the presence of alcohol in the driver's body after he has been arrested or otherwise detained on suspicion of impaired driving.

A. Petitioners' overly broad reading of *Missouri v. McNeely* is misplaced.

The entire foundation of Petitioners' arguments rests on the erroneous premise that, after *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), the Fourth Amendment no longer allows States to condition driving privileges on implied consent to chemical testing when a driver is suspected of impaired driving. *See, e.g., Birchfield* Pet'r Br. 4 (arguing that the decisions of the North Dakota and Minnesota Supreme Courts rob *McNeely* of "all practical import"). Stated differently, Petitioners are essentially arguing that *McNeely* created a constitutional right to refuse to submit to chemical testing under implied-consent laws and a concomitant right not to be penalized for withdrawing implied consent to such searches. That vastly overreads *McNeely*'s holding and ignores key features of that decision.

In *McNeely*, this Court considered the narrow question "whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing

in all drunk-driving cases." 133 S. Ct. at 1556. In clarifying *Schmerber v. California*, 384 U.S. 757 (1966), the Court held that the natural dissipation of alcohol does not constitute a *per se* exigency. Instead, "exigency in this context must be determined case by case based on the totality of the circumstances." *Id.* at 1556, 1559-63.

The fact-specific question whether sufficient exigency exists in a particular case to justify a nonconsensual blood draw without a warrant is far different from the question whether States can reasonably condition the privilege of driving on implied consent to chemical testing when a driver is suspected of impaired driving. Implied-consent and test-refusal laws have long existed throughout the country, and this Court has previously rejected constitutional challenges to them.

For example, in *Mackey v. Montrym*, 443 U.S. 1 (1979), this Court upheld a state statute providing for the suspension of a driver's license without a pre-suspension hearing upon an impaired-driving suspect's refusal to take a breath test. The Court held that the compelling governmental interest in highway safety justified a summary license suspension pending the outcome of a prompt post-suspension hearing. *Id.* at 19. Likewise, in *South Dakota v. Neville*, 459 U.S. 553 (1983), the Court upheld a state statute allowing evidence of an impaired-driving suspect's refusal to take a blood-alcohol test to be admitted at a later trial for driving-while-impaired.

Nowhere in *McNeely* did this Court suggest that it was overruling *Mackey* and *Neville* and invalidating implied-consent and test-refusal laws under the Fourth Amendment. To the contrary, a plurality of the Court specifically pointed to the existence of implied-consent laws as a reason why its holding does not "undermine the governmental interest in preventing and prosecuting drunk-driving offenses." 133 S. Ct. at

1566. The plurality explained that "States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." *Id.* As its first example, the plurality noted that "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing. Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked[.]" *Id.* (internal citations omitted). In other words, the plurality in *McNeely* recognized the distinction between implied-consent laws and the question of whether there is sufficient exigency in a particular case to compel a warrantless sample from an impaired-driving suspect. A driver who withdraws his implied consent may be charged with refusal; whether the officer can actually compel the driver to provide the sample is a completely separate question.

To be sure, the plurality opinion in *McNeely* did not expressly address implied-consent laws that impose criminal sanctions "when a motorist withdraws consent." But neither did it express any disapproval of such laws. What counts is what that opinion makes clear, which is support for imposing significant sanctions on drivers who withdraw their implied consent to be searched upon suspicion of drunk driving. As discussed in §I(B), *infra*, traditional Fourth Amendment balancing supports that conclusion, even when the sanction is criminal penalties.

In many cases, *McNeely* also does not control for another important reason. The Petitioner in *Bernard* is challenging his conviction for refusal to take a *breath* test. But *McNeely* considered only whether the natural dissipation of alcohol constituted a *per se* exigency in the context of *blood* testing. 133 S. Ct. at 1556. This Court did not have reason to rule on, and

the parties had no reason to address, whether and when warrantless breath tests are permissible. That is a critical consideration to the States because breath tests are uniformly included in implied-consent laws across the country. *See* Appendix, *infra*.[1]

This Court has already recognized the minimally intrusive nature of breath testing. "Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment. Further, breath tests reveal the level of alcohol in the . . . bloodstream and nothing more." *See Skinner v. Ry. Labor. Execs.' Ass'n*, 489 U.S. 602, 625 (1989). On this basis alone, *McNeely* is readily distinguishable.

B. Implied-consent and test-refusal laws strike a reasonable balance between the States' compelling interest in eradicating the scourge of impaired driving and the individual privacy rights of drivers.

Petitioners wrongly suggest that implied-consent and test-refusal laws are *per se* unconstitutional because they condition a government privilege (driving) on the implied consent to chemical testing if a driver is suspected of impaired driving. But this Court has never adopted such a *per se* rule in the context of constitutional challenges to search conditions of government privileges. Instead, the Court has balanced the legitimate governmental interests against the intrusion on individuals' privacy. Thus, in *Skinner*, the Court upheld federal regulations that conditioned certain railroad workers' employment on their taking blood and urine tests because the government's compelling interests in safety on the

[1] The Appendix to this Brief includes a nationwide survey of implied-consent and test-refusal laws.

railways outweighed individual privacy concerns of employees. 489 U.S. at 618-33.

In other contexts, the Court has also balanced government interests and individual expectations of privacy to determine whether a warrantless search is reasonable under the Fourth Amendment. *See, e.g.*, *Maryland v. King*, 133 S. Ct. 1958, 1977-79 (2013) (applying balancing test and upholding state statute providing for DNA cheek swabs of suspects arrested for serious offenses); *Samson v. California*, 547 U.S. 843, 848-57 (2006) (applying balancing test and upholding state statute allowing for warrantless searches of parolees). Applied here, that analysis confirms that implied-consent and test-refusal laws are reasonable under the Fourth Amendment because the compelling governmental interests they serve outweigh the individual privacy rights of drivers suspected of impaired driving.

1. The government interest is immense.

The States unquestionably have a compelling interest in combating alcohol-impaired and drug-impaired driving. As recognized in *McNeely*, implied-consent laws are used nationwide as part of that effort, both to deter impaired driving and to punish the offenders. 133 S. Ct. at 1566. The statistics on impaired driving are nothing short of staggering. In 2014 alone, 9,967 people were killed in alcohol-impaired-driving crashes, an average of 1 alcohol-impaired-driving fatality every 53 minutes.[2] These fatalities accounted for 31 percent of all motor-vehicle fatalities that year.[3]

Significantly, these statistics do not even include drunk-driving crashes that caused physical

---

[2] Nat'l Highway Traffic Safety Admin., *Traffic Safety Facts, Alcohol-Impaired Driving* (2014), http://www-nrd.nhtsa.dot.gov/Pubs/812231.pdf.

[3] *Id.*

injury but not death. Nor do these statistics capture injuries or fatalities caused by a *drug*-impaired driver. In 2013-2014, the National Highway Traffic Safety Administration (NHTSA) conducted the most recent National Roadside Survey of Alcohol and Drug Use by Drivers.[4] In its findings, the NHTSA reported an increase in the number of drivers using marijuana or other illegal drugs from its 2007 study.[5] Nearly one in four drivers tested positive for at least one drug that could impair safe driving.[6]

2. Implied-consent laws directly and effectively serve that governmental interest.

Given this compelling governmental interest, it is reasonable for the States to condition driving privileges on the driver's implied consent to chemical testing. This is particularly so because the implied-consent laws are not arbitrary but require suspicion of impaired driving before a test becomes mandatory. In addition, the vast majority of States place significant restrictions on actually administering a chemical test despite a suspect's refusal. Implied-consent laws thus strike a reasonable balance between the governmental interest in eradicating impaired driving and the individual privacy rights of drivers.

Indeed, in the context of drunk driving, this Court has already recognized that implied-consent and test-refusal laws promote public safety on our nation's

[4] Nat'l Highway Traffic Safety Admin., *Traffic Safety Facts, Results of the 2013-2014 National Roadside Survey of Alcohol and Drug Use by Drivers* (February 2015), http://www.nhtsa.gov/staticfiles/nti/pdf/812118-Roadside_Survey_2014.pdf; Nat'l Highway Traffic Safety Admin., *Press Release: NHTSA Releases Two New Studies on Impaired Driving on U.S. Roads* (February 26, 2015), http://www.nhtsa.gov/About+NHTSA/Press+Releases/2015/nhtsa-releases-2-impaired-driving-studies-02-2015.

[5] *Id.*

[6] *Id.*

roadways by (1) serving as a deterrent to drunk driving; (2) providing "strong inducement" for suspected drunk drivers to take chemical tests in order to obtain reliable evidence in subsequent criminal proceedings; and (3) promptly removing drunk drivers from our roadways. *Mackey*, 443 U.S. at 18.

These findings are equally applicable to the growing problem of *drug*-impaired driving, which presents unique challenges distinct from drunk driving. Although breath testing has been recognized as less invasive, it will not reveal the presence of drugs in the body. *See Skinner*, 489 U.S. at 625 (recognizing that a breath test only reveals "the level of alcohol in the bloodstream and nothing more"). A person may be arrested for impaired driving, and a breath test will not reveal the presence of any alcohol. The next reasonable step is for law enforcement to request samples of blood or urine for chemical testing to detect the presence of drugs.[7] Indeed, the vast majority of States have adopted implied-consent laws that cover not only breath, but also blood and urine. *See* Appendix, *infra*. Limiting implied-consent laws to *only* breath testing would unduly hamper States in their ability to combat the growing problem of drug-impaired driving.

3. The intrusion on privacy is minimal.

Conditioning drivers' use of a state's roads on their consent to a chemical test upon detention on suspicion of drunk driving is a relatively small intrusion on drivers' privacy interests. That is so for multiple reasons.

As an initial matter, driving itself is "regulated pervasively." *King*, 133 S. Ct. at 1978 (citing *Skinner*, 489 U.S. at 627). A person cannot legally drive

[7] Multiple States also include saliva or "other bodily substances" in their implied-consent statutes. *See* Appendix, *infra*.

without first obtaining a driver's license. Vehicles must be registered and inspected periodically. When a police officer signals a motor vehicle to stop, the driver must pull over. And during a motor-vehicle stop, the driver must produce certain credentials, including a driver's license, registration, and proof of insurance. All of these regulations, coupled with the statutory notice that implied-consent laws themselves provide to drivers, amount to a reduced expectation of privacy for drivers traveling on public roadways. *See California v. Carney*, 471 U.S. 386,392 (1985); *see also Williams v. State*, 167 So. 3d 483, 493-94 (Fla. Dist. Ct. App. 2015) (considering decreased privacy in motor vehicles in determining reasonableness of breath-alcohol test).

Second, as the Appendix, *infra*, shows, the states' implied-consent laws are triggered only when "a driver is arrested or otherwise detained on suspicion of a drunk-driving offense." *McNeely*, 133 S. Ct. at 1566. On this basis alone, Petitioners' reliance on *Camara v. Mun. Court of San Francisco*, 387 U.S. 523 (1967), is misplaced.

In *Camara*, a property owner refused to allow a warrantless inspection of his premises under a city ordinance providing that employees, "upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City, to perform any duty imposed upon them by the Municipal Code." *Id.* at 525-27. The property owner was then criminally charged for that refusal. *Id.* at 527. This Court held that the property owner "had a constitutional right to insist that the inspectors obtain a warrant to search and . . . may not constitutionally be convicted for refusing to consent to the inspection." *Id.* at 540.

Unlike the law at issue in *Camara*, implied-consent laws do not authorize suspicionless chemical testing of any driver. Instead, as noted, they are

limited to cases where a driver is arrested or otherwise detained on suspicion of impaired driving. This significant limitation on an officer's authority to seek such testing "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime." *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975). Here, of course, the States' interest goes well beyond merely controlling crime but extends to preventing carnage on our roadways. This limitation thus protects drivers who comply with the law by enabling them to resort to the courts for an appropriate remedy if the police did not have the requisite grounds under the implied-consent law for requesting the sample from the driver in the first instance. But when the police have complied with the implied-consent law, suppression should never be a remedy.

A driver's expectation of privacy is even further reduced when — as is the case in *Birchfield* and *Bernard* — he or she is *arrested* on suspicion of impaired driving. An arrest is "inevitably accompanied by future interference with the individual's freedom of movement," *Terry v. Ohio*, 392 U.S. 1, 26 (1968); and arrestees are subject to searches incident to arrest, *see United States v. Robinson*, 414 U.S. 218, 235 (1973), and "routine administrative booking procedure[s]" that include "a station-house search of the arrestee's person and possessions," *Illinois v. Lafayette*, 462 U.S. 640, 643, 645 (1983), and photographing and fingerprinting. *See King*, 133 S. Ct. at 1976; *see also id.* at 1977-79 (upholding state statute providing for DNA cheek swabs of suspects arrested for serious offenses).

The vast majority of States also place significant restrictions on when law enforcement may obtain a chemical sample despite a suspect's refusal. Testing over a suspect's objection is often limited to cases involving an accident resulting in serious bodily injury or death, or where law enforcement obtains a search

warrant or other court order. *See McNeely*, 133 S. Ct. at 1566-67; *see also* Appendix, *infra*. Absent those circumstances, no search even occurs. Indeed, in both *Birchfield* and *Bernard*, no test was given after the refusal.[8] That approach serves the public interest by reducing confrontations between citizens and law enforcement. At the same time, the implied-consent advisory lets the driver know the consequences of withdrawing his or her implied consent.

4. The sanctions States impose for withdrawing implied consent—including criminal penalties—are reasonable and proportionate.

For implied-consent laws to be effective at deterring and punishing impaired driving, a refusal to comply must carry consequences. At a minimum, it is reasonable for States to impose a license suspension when an impaired-driving suspect refuses to comply with the implied-consent law; indeed, the vast majority of States do so. *See* Appendix, *infra*.

After all, "[t]o have used the roads, only thereafter to refuse to consent to chemical testing, is to abuse the driving privilege, and justifies a suspension of those privileges." *People v. Harris*, 170 Cal. Rptr. 3d 729, 735 (2014). And given the inherent dangers of impaired driving to everyone else on the roadways, "[t]he public also has a right to expect the bargain to be honored. . . . [A] person who has shown a disinclination to abide by the agreement is not a fit candidate for continued, immediate, limitless use of the highways." *Id. Accord Neville*, 459 U.S. at 560 (recognizing that suspending a driver's license for refusal to take a blood-alcohol test is "unquestionably legitimate" assuming appropriate procedural protections).

[8] In *Birchfield*, the Petitioner took a preliminary breath test which suggested that he was intoxicated, but he refused to take a blood test. *See Birchfield* Pet'r Br. 4.

It is also reasonable for States to criminalize test refusal as a separate offense, which multiple States, including North Dakota and Minnesota, have chosen to do. *See* Appendix, *infra*. In a 2008 report to Congress, the NHTSA recommended that States should have strong laws and penalties for test refusal in order to increase testing rates for impaired-driving suspects and drivers involved in fatal crashes.[9] Specifically, the National Highway Traffic Safety Administration (NHTSA) recommended that "States should review their laws and practices to ensure that refusal to take a BAC test is a criminal offense and that the penalties are greater than those for conviction on an impaired driving offense."[10]

The NHTSA report expressed concern that license suspension alone, as a consequence of test refusal, may be insufficient to deter and punish impaired driving. As the report notes, "[t]here is suspicion that many DWI offenders refuse to take the BAC test in order to avoid or reduce the chance of facing criminal sanctions upon conviction for DWI; instead they may hope to receive a minor administrative license suspension for their criminal and dangerous behavior, rather than sanctions appropriate with a DWI conviction."[11] It is thus reasonable for a State to impose the same sanctions for test refusal as those that apply to a DWI conviction itself to both deter and punish impaired driving.

* * * *

All told, it is eminently reasonable for the States to condition the privilege of driving on the driver's implied consent to chemical testing when a driver is

---

[9] Nat'l Highway Traffic Safety Admin., *Refusal of Intoxication Testing: A Report to Congress* (2008), http://www.nhtsa.gov/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/811098.pdf.

[10] *Id.* at 20.

[11] *Id.* at 18.

arrested or otherwise detained for impaired driving. In the vast majority of States, drivers can revoke that implied consent (absent a court order or an accident involving death or serious bodily injury) and no test will be given. *See McNeely*, 133 S. Ct. at 1566-67; *see also* Appendix, *infra*. But to deter and punish drunk driving, the States have reasonably chosen to impose penalties, ranging from license suspensions and fines to criminal penalties, including possible jail time, for test refusal. *Id.* In short, implied-consent and test-refusal laws strike a reasonable balance between the governmental interest in promoting public safety on our roadways and the individual privacy rights of drivers.

II. A driver's decision to consent to a chemical test is not coerced by the penalties attached to a refusal.

Accurately informing a driver of the penalties for refusal ensures that the driver makes an informed choice about whether to consent to the testing or refuse the testing. It does not, as the Petitioner in *Beylund* contends, render the driver's decision to consent to testing *per se* involuntary. Such a *per se* rule "has no more place in Fourth Amendment law than the *per se* exigency rejected by the majority in *McNeely*." *People v. Harris*, 184 Cal. Rptr. 3d 198, 211 (Cal. Ct. App. 2015).

Indeed, this Court has already recognized that "the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices." *Neville*, 459 U.S. at 564. In *Neville*, this Court held that "a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination." *Id.*

The same reasoning applies to a driver's decision to submit to a chemical test rather than face penalties for a refusal. "[A]dvising a defendant of the lawful consequences that may flow from his or her decision to engage in a certain behavior ensures that [the] defendant makes an informed choice whether to engage in that behavior or not." *State v. Moore*, 318 P.3d 1133, 1138 (Or. 2013). *Accord Harris*, 184 Cal.Rptr.3d at 211-13 (applying *Neville* and holding that choice between submitting to chemical test or facing consequences for refusal under implied-consent law "does not in itself render the motorist's submission to be coerced or otherwise invalid" under Fourth Amendment).

In arguing otherwise, Beylund's reliance on *Bumper v. North Carolina*, 391 U.S. 543, 546-50 (1986), is misplaced. In *Bumper*, this Court found a homeowner's consent to search invalid when the homeowner acquiesced to the police entry after she was informed that police had a search warrant for her home. This Court held that "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect *that the occupant has no right to resist the search*." *Id.* at 550 (emphasis added). Unlike *Bumper*, in the vast majority of States, impaired-driving suspects are given a choice whether to submit to the law or refuse a chemical test and suffer the legal consequences. The driver's choice is honored absent a court order or an accident involving death or serious bodily injury. *See State v. Brooks*, 838 N.W.2d 563 (Minn. 2013) (rejecting defendant's argument that his consent to chemical testing of his blood and urine was involuntary because, unlike *Bumper*, the Minnesota implied-consent law gives drivers a statutory right to refuse a chemical test); *see also* Appendix, *infra*.

In other words, it is actually to a driver's benefit to be fully informed of the applicable law before making the decision whether to consent to or refuse a

chemical test. After all, it can hardly be considered coercive to accurately advise an impaired-driving suspect of the governing law, which he or she is already presumed to be on notice of. *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (recognizing "the familiar maxim [that] ignorance of the law is no excuse" for engaging in criminal behavior). In fact, some States actually require such an advisement. *See, e.g.*, *State v. O'Driscoll*, 73 A.3d 496 (N.J. 2013) (requiring State to prove as element of refusal conviction that defendant was informed of consequences of refusal). *Cf. Brewer v. Motor Vehicle Div.*, 720 P.2d 564, 569-70 (Colo. 1986) (holding that there is "no constitutional or statutory requirement" that an impaired-driving suspect be advised of legal consequences of refusal). When a police officer accurately advises an impaired-driving suspect about the governing implied-consent law, that is not coercive but in fact promotes a knowing and voluntary choice.

* * * *

In sum, a driver on a public roadway suspected of impaired driving has no constitutional right to refuse to submit to chemical testing to detect alcohol or drugs in the body, and the States can thus lawfully impose punishment for refusal to comply with their implied-consent laws. Certainly, informing a driver suspected of impaired-driving of those lawful consequences is not coercive but in fact promotes a knowing and voluntary choice.

CONCLUSION

For the foregoing reasons, the judgments of the North Dakota Supreme Court and the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

ROBERT LOUGY
Acting Attorney General of New Jersey

JENNIFER E. KMIECIAK
Deputy Attorney General
Counsel of Record
kmieciakj@njdcj.org

CLAUDIA JOY DEMITRO
GARIMA JOSHI
IAN C. KENNEDY
LILA B. LEONARD
Deputy Attorneys General

New Jersey Division of Criminal Justice
Appellate Bureau

Dated: March 22, 2016

ADDITIONAL COUNSEL

Luther Strange
Attorney General
State of Alabama

Craig W. Richards
Attorney General
State of Alaska

Leslie Rutledge
Attorney General
State of Arkansas

Cynthia H. Coffman
Attorney General
State of Colorado

Douglas S. Chin
Attorney General
State of Hawaii

Derek Schmidt
Attorney General
State of Kansas

Jeff Landry
Attorney General
State of Louisiana

Timothy C. Fox
Attorney General
State of Montana

Hector Baldares
Attorney General
State of New Mexico

Bruce R. Beemer
First Deputy Attorney General
Commonwealth of Pennsylvania

Peter F. Kilmartin
Attorney General
State of Rhode Island

Alan Wilson
Attorney General
State of South Carolina

Marty J. Jackley
Attorney General
State of South Dakota

Ken Paxton
Attorney General
State of Texas

Sean D. Reyes
Attorney General
State of Utah

William H. Sorrell
Attorney General
State of Vermont

Brad D. Schimel
Attorney General
State of Wisconsin

APPENDIX

Nationwide Survey of Implied Consent and Refusal Laws

	Statutes	**Sample(s) Authorized**	**Test Given If Refusal?**	**Lic. Susp./ Fines**	**Jail Time**
AL	Ala. Code § 32-5-192; -200	Blood, breath, or urine	Death or serious physical injury (SPI) + court order (blood)	**1st:** 90 days **2nd+**: 1 yr (if w/in 5 yrs) If death or SPI: 2 yrs	N/A
AK	Alaska Stat. § 28.15.181; .35.031; .032;.035	Breath; blood and urine in death or serious physical injury (SPI)	Only if death or SPI	**1st**: 90 days, $1,500 min **2nd**: 1 yr, $3,000 min **3rd**: 3 yrs, $4,000 min **4th**: 5 yrs min, $4,000 - $7,000	**1st**: 72 hrs min **2nd**: 20 days min **3rd+**: 60-360 days

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
AZ	Ariz. Rev. Stat. Ann. § 28-1321	Blood, breath, urine or other bodily substance	Only with search warrant or if sample is taken "for any reason," must be provided to law enforcement	**1st**: 12 mos; **2nd+**: 2 yrs if prior w/in 84 mos	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
AR	Ark. Code Ann. § 5-65-202; -205; -208	Blood, breath, saliva or urine	Only if DWI + death	**1st**: 180 days; **2nd**: 2 yrs if w/in 5 yrs of 1st offense; **3rd**: 3 yrs if w/in 5 yrs of 1st offense **4th**: Life if w/in 5 yrs of 1st offense	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
CA	Cal Veh. Code § 13353; 14905; 23612	Blood or breath (person chooses); urine if blood test unavailable	Only if DWI + circumstances require prompt testing (case law)	**1st**: 1 yr **2nd**: 2 yrs if w/in 10 yrs of 1st offense **3rd**: 3 yrs if w/in 10 yrs of 1st offense Fine: $125	If convicted of DWI
CO	Colo. Rev. Stat. § 42-2-126; -4-1301.1	Breath or blood for alcohol (person can choose); blood, saliva, and urine for drug content	Only if DWI + enumerated offense	**1st**: 1 yr **2nd**: 2 yrs **3rd**: 3 yrs	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
CT	Conn. Gen. Stat. § 14-227b; -227c	Blood, breath, or urine; blood or breath if death or serious physical injury (SPI)	Only if DWI + death or SPI	45 day susp. plus interlock device for 1 to 3 yrs	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
DE	Del. Code Ann. tit. 21 § 2740; 2742	Blood, breath, and/or urine	No	**1st**: 1 yr **2nd**: 18 mos if prior refusal w/in 5 yrs **3rd +**: 24 mos if 2 prior refusals w/in 5 yrs (Different penalties for under age 21)	N/A
DC	D.C. Code Ann. § 50-1904.02; .05	Blood, breath, or urine (officer chooses)	Only if DWI + death (may employ whatever means are reasonable)	12 mos	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
FL	Fla. Stat. Ann. § 316.1932; .1933; .1939	Including, but not limited to, breath for alcohol content, blood for death or serious bodily injury (SBI); urine for drug content	Only if DWI + death or SBI (may use reasonable force if necessary)	**1st**: 1 yr **2nd+**: 18 mos Fine: $1,000 max	**2nd+**: up to 1 yr

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
GA	Ga. Code Ann § 40-5-55; -67.1; -67.2	Blood, breath, urine, or other bodily substances	Does not preclude search warrant	**1st**: 1 yr **2nd**: 3 yrs **3rd+**: 5 yrs	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
HI	Haw. Rev. Stat. § 291E-11, -15, -21, -68 *Note*: Consent after informed of criminal refusal consequences not voluntary under Hawaii Constitution. *State v. Won*, 361 P.3d 1195 (Haw. 2015).	Breath, blood, or urine	Only if collision results in injury or death	Fine: $1,000 max Admin Rev: **1st**: 2 yrs **2nd**: 3 yrs **3rd**: 4 yrs **4th**: 10 yrs (Ch. 291E, Part III; § 291E-41) (Under 21: **1st**: 1 yr **2nd+**: 2-5 yrs No fine (§ 291E-65))	30 days max (Under age 21: none)

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
ID	Idaho Code § 18-8002	Breath, blood, or urine	Only if aggravated driving or death	1st: 1 yr 2nd+: 2 yrs Fine: $250	N/A
IL	625 Ill. Comp. Stat. 5/6-208.1; 5/11-501.1; -501.6; -501.8	Breath, blood, or urine	No statutory right to refuse, but officer cannot use physical force (case law)	**1st**: 1 yr **2nd+**: 3 yrs	N/A
IN	Ind. Code § 9-30-6-1; -6-6(h); -7-3; -7-5	Breath, blood, or urine	Reasonable force authorized	**1st**: 1 yr **2nd+**: 2 yrs	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
IA	Iowa Code Ann. § 321J.6	Breath, blood, or urine	Warrant + death or likely death; warrantless with exigency; driver can refuse blood test if they submit to officer's 2nd choice	**1st**: 1 yr **2nd+**: 2 yrs Provisions for ignition interlock for temporary restricted license	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
KS	Kans. Stat. Ann. § 8-1001(a); -1025 (refusal statute invalidated in *State v. Ryce*, No. 111,698, 2016 Kan. LEXIS 107 (Kan. February 26, 2016)	Breath, blood, or urine	Case law pending	1 yr lic. susp.; If prior DUI/ refusal (criminal): **1st**: $1,250-$1,750 **2nd**: $1,750-$2,500 **3rd+**: $2,500	If prior DUI/refusal **1st:** 90 days-1 yr (min 5 days, work release after 48 hrs) **2nd & 3rd:** min 90 days (work release after 48 hrs (2nd), 72 hrs (3rd)) Struck down in *Ryce* under 4th Amend.

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
KY	Ky. Rev. Stat. Ann. § 189A.070; .103; .105	Breath, blood, or urine	Only if search warrant or court order + death or physical injury	**1st**: 30-120 days **2nd**: 12-18 mos **3rd+**: 24-36 mos	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
LA	La. Rev. Stat. Ann. § 14:98.7; 32:661; :666; :667	Breath, blood, or urine	Only if DWI + injury or death, or two prior refusals	1 yr, no eligibility for hardship license if death or serious bodily injury **1st**: 1 yr **2nd**: 2 yrs if prior refusal w/in 10 yrs Fine: $300 to $1,000	10 days-6 mos

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
ME	Me. Rev. Stat. Ann. tit. 29-A, § 2521; 2522	Breath, blood, or urine	Only if DWI + death or life threatening injury	**1st**: 275 days; 1 yr if injury or death **2nd**: 18 mos **3rd**: 4 yrs **4th+**: 6 yrs	N/A
MD	Md. Code Transp.§ 16-205.1; 205.2	Breath (or blood if statutory conditions require) for alcohol; blood for drug content	Only if DWI + death or life threatening injury	**1st**: 120 days **2nd+**: 1 yr	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
MA	Mass. Gen. Law ch. 90, § 24 (1) (f)(1)	Breath or blood	No	**1st**: 180 days **2nd**: 3 yrs **3rd**: 5 yrs **4th+**: Life	N/A
MI	Mich. Comp. Laws § 257.625a(6); .625d, .625f	Blood, breath, or urine (preliminary breath test)	Only with a court order	**1st**: 1 yr **2nd+**: 2 yrs	N/A
MN	Minn. Stat. § 169A.03; .20; .24; .26; .275-.76; .51-.53	Blood, breath, or urine	Only if DWI + vehicular homicide or injury	**1st**: 1 yr min, $3,000 max **2nd**: 2 year min, $3,000 max **3rd+**: 3 year min, $3,000-$14,000	**1st, 2nd, and 3rd**: 1 yr max **4th**: 7 yrs max

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
MS	Miss. Code § 63-11-5; -8; -21; -23; -30(4)	Breath for alcohol; blood, breathe, or urine for other substances	Only if warrant or exigency (case law)	For breath refusal: 90 days (no prior DWI); 1 yr (prior DWI); provisions for restricted lic. w/ ignition interlock	N/A
MO	Mo. Ann. Stat. § 577.020; .041	Blood, breath, urine, or saliva	Unsettled (prior version of statute provided that no test shall be given upon refusal, but that phrase was deleted from the statute)	1 yr	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
MT	Mont. Code Ann. § 61-8-402; -409; 402(6)(a)	Blood or breath (prelim. breath test)	Blood, only if probable cause + search warrant + person has prior refusal or has certain DWI charges or convictions	**1st**: 6 mos **2nd+**: 1 yr Fine: $300	N/A
NE	Neb. Rev. Stat.§ 28-105; -106; § 60-498.01(2); -498.02; -6,197; 6,197.02; -197.04	Blood, breath, or urine (prelim. breath test)	No	**1st:** 1 yr admin and 6 mos criminal, $500 max **2nd:** 18 mos, $500 max **3rd+:** 15 yrs, $1,000-$10,00	**1st:** 60 days max **2nd:** 6 mos max **3rd:** 1 yr max **4th**: 3 yrs max

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
NV	Nev. Rev. Stat. Ann. § 484C.150; .160; .210(1)	Blood, breath, or urine (preliminary breath test)	Only if warrant or court order (case law)	**1st**: 1 yr **2nd+**: 3 yrs	N/A
NH	N.H. Rev. Stat. 265-A:4; -A:14; -A:15, -A:16	Blood, breathe, or urine (preliminary breath test)	Only if DWI + death or serious bodily injury	**1st**: 180 days **2nd+**: 2 yrs	N/A
NJ	N.J. Stat. Ann. § 39-50.2; -50.4a	Breath	Only if search warrant or exigency, but no unreasonable force (case law)	**1st**: 7 mos-1 yr, $300-$500 **2nd**: 2 yrs, $500-$1,000 **3rd**: 10 yrs, $1,000	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
NM	N.M. Stat. Ann. § 66-8-107; -111	Breath, blood, or both	Only if search warrant + DWI + death or great bodily injury or felony	**1st**: 6 mos **2nd+**: 1 yr	N/A
NY	N.Y. Veh. & Traf. Law § 1194	Breath, blood, urine, or saliva	Only if court order + DWI + death or serious physical injury	**1st**: 1 yr, $500 **2nd+**: 18 mos, $750	N/A
NC	N.C. Gen. Stat. § 20-4.01; -16.2	Breath, blood, or other bodily fluid or substance	Does not preclude other applicable procedures of law	12 mos	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
ND	N.D. Cent. Code § 39-08-01; -20-01; -20-01.1	Breath, blood, or urine	Only if search warrant or exigency + DWI + death or serious bodily injury	License suspension: 180 days-3 yrs Fines: $500-$2,000 (depending on number of prior refusals)	**1st**: 2 days min if BAC .16+ **2nd** (w/in 7 yrs): 10 days min + sobriety program **3rd** (w/in 7 years): 120 days min **4th+** (w/in 15 yrs): 1 yr + 1 day

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
OH	Ohio Rev. Code Ann. § 4511.191	Whole blood, blood serum or plasma, breath, or urine	Yes: officers may employ whatever reasonable means are necessary	**1st**: 1 yr **2nd**: 2 yrs (if prior refusal w/in 6 yrs) **3rd**: 3 years (if prior refusal w/in 6 years) Fine:$475 to reinstate license	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
OK	47 Okl. St. § 6-205.1; 751; 753;	Blood or breath for alcohol; blood, saliva or urine for other intoxicating substances	Only if DWI + search warrant or death or serious physical injury	**1st**: 180 days **2nd**: 1 yr (if prior refusal w/in 10 yrs) **3rd**: 3 yrs (if prior refusal w/in 10 yrs)	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
OR	Or. Rev. Stat. § 813.095; .100; .130; .131; .420, .430	breath; blood (if the person is receiving medical care after accident); urine if breath test less than 0.08 or accident with injury or property damage	Breath or blood through any lawful means, including, but not limited to, obtaining a search warrant.	**1st**: 1 yr **2nd+**: 3 yrs (if prior refusal, DWI, or diversion program w/in 5 years) Fine: $500-$1,000	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
PA	75 Pa. Cons. Stat. Ann. § 1547	Breath, blood, or urine	No	**1st**: 1 yr **2nd+**: 18 mos	N/A
PR	P.R. Laws Ann., tit. 9, § 5208	Blood, breath, or other bodily fluid	If refusal, person shall be arrested and transferred to medical facility to extract pertinent sample	Penalties not specified	Penalties not specified

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
RI	R.I. Gen. Laws § 31-27-2.1	Breath, blood, and/or urine	Only if search warrant	**1st**: 6 mos-1 yr, $200-$500 **2nd**: 1-2 yrs (if refusal w/in 5 yrs of previous offense) $600-$1,000 **3rd**: 2-5 yrs (if refusal w/in 5 years of previous offense), $800-$1,000	**2nd**: 6 mos max **3rd**: 1 yr max

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
SC	S.C. Code Ann. § 56-5-2946; -2950; -2951	Breath, blood, or urine (breath first if alcohol)	Only if DWI + great bodily injury or death	**1st**: 6 mos **2nd**: 9 mos **3rd**: 12 mos **4th+**: 15 mos	N/A
SD	S.D. Codified Laws § 32-23-1; -10; -11 *Note:* Implied-consent law invalidated in *State v. Fierro*, 853 N.W.2d 235 (S.D. 2014)	Breath, blood, or other bodily substance	Only if search warrant, actual consent, or exigent circumstances	1 yr	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
TN	Tenn. Code Ann. § 55-10-406; -407	"a test or tests for the purpose of determining the alcoholic content of that person's blood, a test or tests for the purpose of determining the drug content of the person's blood, or both tests"	Only if warrant; accident involving injury or death + probable cause (PC) for DWI, vehicular homicide (VH) or aggravated vehicular homicide (AVH); PC for DWI, VH, or AVH + prior conviction for one of these offenses; or PC for DWI, VH, or AVH + passenger under 16	**1st**: 1 yr; 2 yrs if serious bodily injury; 5 yrs if death **2nd+**: 2 yrs; 5 years if death Fine: $1,000 if driving while suspended	if refusal occurs while driving on suspended license: 5 days

	Statutes	Samplè(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
TX	Tex. Transp. Code Ann. § 724.011; .012(b); .013; .035	Breath or blood (officer chooses, but driver can consent to another specimen)	Only if DWI + death/serious bodily/penal Code arrest/on CSL	**1st**: 180 Days **2nd+**: 2 yrs	N/A
UT	Utah Code Ann. § 41-6a-520; -521	Breath, blood, urine, or oral fluids	No	**1st**: 18 mos **2nd+**: 36 mos If previous alcohol-related suspension or prior DUI conviction w/in 10 yrs, 36 mos	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
VT	Vt. Stat. Ann. tit. 23 § 1201(b); 1202; 1205; 1206; 1208; 1210	Breath, blood	Only if DWI + search warrant + accident or death or serious bodily injury (SBI)	**1st:** 6 mos but if prior DWI, then 90 days and $750 max **2nd:** 18 mos and if prior DWI $1,500 max **3rd:** Life and if prior DWI $2,500 max **SBI**: 6 mos, $5,000 max **Death:** 1 yr, $10,000 max	**1st & 2nd:** if prior DWI, 2 yrs max **3rd:** if prior DWI, 5 yrs max **4th+**:if prior DWI, 10 yrs max **SBI or death**: 15 yrs max

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
VA	Va. Code Ann. § 18.2-268.2; -268.3; § 46.2-391.2	Blood, breath	Blood may be required if drugs, high BAC, under 21, or Suspended License	**1st:** 1 yr + 7 days **2nd:** 3 yrs + 60 days, fines for Class 2 misd. If prior DWI w/in 10 yrs **3rd**: 3 yrs, fines for Class 1 misd. If 2 prior DWIs w/in 10 yrs	**2nd**: if 1 prior DWI w/in 10 yrs, Class 2 misd. **3rd**: if 2 prior DWIs w/in 10 yrs, Class 1 misd.

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
WA	Wash. Rev. Code Ann. §46.20.308; .3101	Breath	Only if exigent circumstances or warrant (blood)	**1st:** 1 yr **2nd:** 2 years (if prior incident w/in 7 yrs)	If convicted of DWI
WV	W. Va. Code § 17C-5-4	Blood or breath (secondary chemical testing only)	Does not preclude search warrant (case law)	**1st**: 1 yr or 45 days with 1 yr interlock **2nd**: 10 yrs (can be reduced to 5 upon completion of safety program **3rd+**: Life	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
WI	Wis. Stat. Ann. § 343.305	Breath, blood, or urine (officer chooses)	Only if exigent circumstances	**1st**: 1 yr **2nd**: 2 yrs if prior OWI-related convictions, suspensions, or revocations (refusals count as priors) w/in 10 yrs **3rd**: 3 yrs if 2+ prior convictions (described above) in lifetime	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
WY	Wyo. Stat. Ann. § 31-6-102	Blood, breath, or urine	Only if DWI + serious bodily injury or death or search warrant	N/A	N/A